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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES W. NEWTON,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does claimant James W. Newton have standing to contest the forfeiture to the United States government of the 18th century gold monstrance seized from his possession by U.S. Customs agents?

2. Does the holding that claimant James W. Newton lacked standing, combined with the rejection of his petition for remission, and the approval of the agreed judgment between the governments of the United States and the Republic of Colombia, deprive James W. Newton of property without due process of law?

II

PARTIES

1. James W. Newton
2. The United States
3. The Republic of Colombia

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	I
PARTIES	II
OPINIONS BELOW	1
STATEMENT OF JURISDICTIONAL GROUNDS	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
ARGUMENT	5
QUESTION ONE	5
Claimant James W. Newton has standing to contest the forfeiture of the monstrance to the United States government.	
A. General Standing Principles	5
B. The Requirement of An Ownership Interest	8
QUESTION TWO	13
The holding that claimant James W. Newton lacked standing, combined with the rejection of his petition for remission, and the approval of the agreed judgment between the governments of the United States and the Republic of Colombia deprived James W. Newton of property without due process of law.	
CONCLUSION	17

Page

APPENDIX A:

Opinion of the Fifth Circuit 1a

Final Judgment of the District Court 20a

Findings of Fact and Conclusions of Law of the District Court 23a

Order of District Court Striking Claim of James W. Newton 39a

Judgment of the Fifth Circuit 45a

Opinion of Fifth Circuit Denying Petition for Rehearing and Suggestion for Rehearing En Banc 47a

APPENDIX B:

Constitutional Provisions and Statutes 50a

APPENDIX C:

Excerpt From the Testimony of James W. Newton 55a

APPENDIX D:

Claim of James W. Newton 62a

APPENDIX E:

Denial of Petition for Remission 65a

TABLE OF AUTHORITIES

CASES

	Page
Baker v. Carr, 369 U.S. 186 (1962)	6
Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974)	5, 13
Flast v. Cohen, 392 U.S. 83 (1968)	7
National Atlas Elevator Co. v. United States, 97 F.2d 940 (8th Cir. 1938)	16
Sierra Club v. Morton, 405 U.S. 727 (1972)	8
Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976)	7
United States v. One 1973 Buick Riveria Automobile, 560 F.2d 897 (8th Cir. 1977)	16
United States v. Caldwell, 49 U.S. (8 How.) 366 (1850)	5, 15
United States v. One 1976 Chevrolet Corvette, 477 F. Supp. 32 (E.D. Pa. 1979)	14
United States v. One Colombian Monstrance, 797 F.2d 1370 (5th Cir. 1986), reh. denied, 802 F.2d 837	9, 10
United States v. Currency Totaling $48,318.08, 609 F.2d 210 (5th Cir. 1980)	16
United States v. One 1945 Douglas C-54 (DC-4) Aircraft, 604 F.2d 27 (8th Cir. 1979), appeal after remand, 647 F.2d 864 (8th Cir. 1981), cert. denied sub nom. Stumpff v. United States, 454 U.S. 1143 (1982)	10, 11
United States v. One Ford Coupe Automobile, 272 U.S. 321 (1926)	12
United States v. One 1936 Model Ford V-8 Deluxe Coach, 307 U.S. 219 (1939)	8
United States v. Four Cases of Lastings, Fed. Cas. No. 15,145, 10 Ben. 371 (1879)	15
United States v. Grundy and Thornburgh, 7 U.S. (3 Cranch.) 337 (1806)	15
United States v. One 1978 Piper Navajo PA-31 Aircraft, 748 F.2d 316 (5th Cir. 1984)	9
United States v. 1982 Sanger 24′ Spectra Boat, 738 F.2d 1043 (9th Cir. 1984)	4, 10
United States v. Stowell, 133 U.S. 1, 10 S. Ct. 244 (1890)	14
United States v. United States Coin and Currency, 401 U.S. 715 (1971)	14
United States v. United States Currency in the Amount of $2,857.00, 754 F.2d 208 (7th Cir. 1985)	12
United States v. One Hundred Twenty-two Thousand Forty-Three Dollars ($122,043.00) in United States Currency, 792 F.2d 1470 (9th Cir. 1986)	10

CASES

	Page
United States v. Five Hundred Thousand Dollars, 730 F.2d 1437 (11th Cir. 1984)	11
United States v. $3799.00 in United States Currency, 684 F.2d 674 (10th Cir. 1982)	11
United States v. York Street Flax Spinning Co., Fed. Cas. No. 16781, 17 Blatchf. 138 (1879)	15, 16
Warth v. Seldin, 422 U.S. 490 (1975)	7, 9

UNITED STATES CONSTITUTION

Fifth Amendment	2

UNITED STATES STATUTES

18 U.S.C. § 545	2, 5, 15, 16
18 U.S.C. § 1963(m)	13
19 U.S.C. § 1483(1)	9
19 U.S.C. § 1608	2, 8
19 U.S.C. § 1615	2, 8
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1355	3
28 U.S.C. § 1395(b)	3
28 U.S.C. § 2345	3

FEDERAL RULES OF CIVIL PROCEDURE

Rule C(6) (Supp.)	2, 12

MISCELLANEOUS

H. Rep. 1030, 98th Cong., Sess. 200 (1984) *reprinted in* 1984 U.S. Code Cong. & Admin. News 3383	13
H. Rep. 1156, 98th Cong., 2d Sess. 134 (1984) *reprinted in* 1984 U.S. Code Cong. & Admin. News 5251	8
S. Rep. No. 2326, 83d Cong., 2d Sess. 8 (1954) *reprinted in* 1954 U.S. Code Cong. & Admin. News 3900	16

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OPINIONS BELOW

1. United States of America, Plaintiff v. One Eighteenth Century Colombian Monstrance, Known as The Keeper of the Host of Santa Clara, 11.3 Troy Pounds of Gold with Approximately 1,500 Precious and Semiprecious Stones and Pearls, Defendant; Civil Action No. SA-83-CA-2681 (W.D. Tex., San Antonio Division, September 27, 1985).

2. United States of America, Plaintiff-Appellee v. One 18th Century Colombian Monstrance, Known as the Keeper of the Host of Santa Clara, 11.3 Troy Pounds of Gold with Approximately 1,500 Precious and Semi-Precious Stones and Pearls, Defendant; James W. Newton, Claimant-Appellant, No. 85-2643 (5th Cir., August 27, 1985) (Reported at 797 F.2d 1370).

3. United States of America, Plaintiff-Appellee v. One 18th Century Colombian Monstrance, Known as the Keeper of the Host of Santa Clara, 11.3 Troy Pounds of Gold with Approximately 1,500 Precious and Semi-Precious Stones and Pearls, Defendant; James W. Newton, Claimant-Appellant, No. 85-2643, On Petition for Rehearing and Suggestion for Rehearing En Banc (5th Cir., October 22, 1986) (Reported at 802 F.2d 837).

STATEMENT OF JURISDICTIONAL GROUNDS

The Supreme Court of the United States has jurisdiction of this Petition for Writ of Certiorari under the provisions of 28 U.S.C. § 1254(1). This Petition seeks review of a judgment of the United States Court of Appeals, Fifth Circuit, rendered on October 22, 1986, which denied Petitioner James W. Newton's Petition for Rehearing. The Court of Appeals had, on August 27, 1986, affirmed the judgment of the District Court of the Western District of Texas denying Newton's standing to pursue his claim in the proceedings for forfeiture of the monstrance, and recognizing the agreed judgment between the United States and the Republic of Colombia, the only other claimant to it.

STATUTES INVOLVED

(See Appendix for quotation of Texts)

1. Fifth Amendment, U. S. Constitution
2. 18 U.S.C. § 545
3. 19 U.S.C. § 1608 (subsequently amended).
4. 19 U.S.C. § 1615 (subsequently amended).
5. Fed. R. Civ. P. (Supp.) C(6).

STATEMENT OF THE CASE

On January 20, 1983, U. S. Customs agents seized from the possession of Petitioner-Claimant James W. Newton an eighteenth century gold monstrance, a religious vessel used to display the communion host. The monstrance, known as the Keeper of the Host of Santa Clara, was made in Colombia by the jeweler to the Royal Court of Spain. It was imported into the United States by Edward Uhart, who has subsequently been indicted, but not tried or convicted, on charges of fraudulent importation.[1]

The United States government filed a suit for forfeiture in the United States District Court, Western District of Texas, which court had jurisdiction under 28 U.S.C. §§ 2345, 1355 and 1395(b). Following an evidentiary hearing, the district court dismissed Newton's claim in the forfeiture proceeding, holding that he lacked standing to contest the forfeiture. The court determined that Newton lacked "an ownership interest" in the monstrance, despite his unequivocal testimony that he had decided to purchase the monstrance himself, rather than see it leave San Antonio, and had personally borrowed two hundred thousand dollars to make the down payment to Uhart. See testimony of James W. Newton, pp. 69-75, appendix. No other witnesses testified. In making the determination, the court looked to the contracts between Uhart and Newton which gave Newton the right to possess the monstrance for a period of a year (later extended), during which time he could look for someone to purchase the monstrance for one million dollars and retain twenty percent of the proceeds of

1. Uhart to date has not returned to the United States to face the crimnial charges.

the sale. The contracts in no sense precluded Newton from electing to make the purchase in his own right and later reselling the monstrance.

Following Newton's dismissal from the case, the United States and Colombia (the only other claimant to the monstrance) entered into an agreed judgment which forfeited the monstrance to the United States. Pursuant to their agreement, the United States then remitted the monstrance to Colombia, denying Newton's claim for remittance. The monstrance was forfeited to the United States on the basis of stipulated evidence, and not in a contested proceeding.[2] The district court rejected Newton's offer of proof contesting the forfeiture since he was no longer a party to the proceeding.

The Fifth Circuit affirmed the court below, holding that Newton lacked standing and had no ownership interest in the monstrance. This decision is in conflict with the general principles of standing set forth by this Court, which hold that the allegations of a complaint are considered, and not that a plaintiff must prove his standing in an evidentiary hearing. Moreover, even if some additional standing requirement in forfeiture proceedings is appropriate, the Fifth Circuit's requirement that a claimant prove an ownership interest in the *res* is directly in conflict with that of the Ninth Circuit, which has expressly held that one in possession of the object at the time of its seizure has standing to file a claim in the forfeiture action, even if he has no ownership interest. *United States v. 1982 Sanger 24' Spectra Boat,*

2. Newton suggests that the judgment and the findings of fact and conclusions of law should be skeptically reviewed, in view of this agreement between the two governments involved. The case was not contested; evidence against the forfeiture was not presented. The court heard no live witnesses except Newton.

738 F.2d 1043, 1046 (9th Cir. 1984). It also conflicts with the holdings and practices of the other circuits.

In *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), this Court indicated that an innocent owner or secured party who was in no way responsible for the illegal act which led to the forfeiture, and who had done all that he could to ensure the lawful use of property has a claim of constitutional dimensions since "it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive" under such circumstances. *Id.* at 688-90. Newton submits that he is such an owner and that he has been deprived of his property without due process of law in violation of the Fifth Amendment. This claim is further buttressed by the fact that the relation-back doctrine, under which property is forfeited to the United States at the time of the illegal act is inapplicable under 18 U.S.C. § 545, upon which the government relies. Rather, under 18 U.S.C. § 545, a good faith innocent purchaser for value cuts off the right of the government to forfeit the property; the government is relegated to seeking the value of the property from the smuggler. *See United States v. Caldwell*, 49 U.S. (8 How.) 366, 367 (1850).

ARGUMENT

QUESTION ONE

Claimant James W. Newton has standing to contest the forfeiture of the monstrance to the United States government.

A. General Standing Principles

Newton filed a verified claim asserting his interest in the monstrance, and he testified that he bought the mon-

strance from Edward Uhart for his own account, that he borrowed the money to make the down payment, and that he has paid all of the interest and some principal on the note. Testimony of James Newton, pp. 69-75, 86; verified claim of James W. Newton (see appendix).

Even if we assume that the district court correctly held that Newton does not own the monstrance, it does not follow that he lacks standing to contest the forfeiture. Newton had entered into contracts with Uhart which gave him, at a minimum, exclusive possession of the monstrance and the right to sell it. When Newton decided to purchase the monstrance himself, he obtained three guarantors to back his loan. His agreement with the guarantors provided that if the monstrance were resold for a price over one million dollars, the four men would share equally in any proceeds over that sum. Testimony of James Newton, pp. 69-75. Since the monstrance has been appraised at over three million dollars, it is obvious that Newton has a considerable financial stake in the outcome of the forfeiture proceedings. In fact, his financial stake exceeds that of Edward Uhart, the importer of the monstrance.[3]

These allegations are sufficient to demonstrate that he has standing to contest the forfeiture. Newton has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions."[4] *Baker v. Carr,* 369 U.S. 186, 204 (1962).

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3. Uhart bought the Monstrance in Colombia for $110,000; Newton had $200,000 at risk.

4. Indeed, the record makes clear that Newton is the only claimant who can demonstrate such concrete adversity; Colombia and the United States have agreed to take the property from Newton

Standing "focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Flast v. Cohen,* 392 U.S. 83, 99 (1968). The court should look not to the merits of a party's claim, but to the allegations contained in the party's petition. *See Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 38-39 (1976) ("[T]he Court held the Constitutional standing requirement under this section to be allegations which, if true, would establish that the plaintiff had been injured in fact by the action he sought to have reviewed"). "In essence, the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin,* 422 U.S. 490, 498 (1975).

The courts below, by first addressing Newton's ownership interest and striking his claim, denied Newton the opportunity to contest the government's forfeiture of the monstrance, and possibly persuade the trier of fact that it was not subject to forfeiture. If not subject to forfeiture, the monstrance would have been returned to Newton, leaving the Republic of Colombia to pursue its claim to the monstrance, if any, directly with Newton.

This Court has said:

> "The requirement that a party seeking review must *allege* facts showing that he is himself adversely affected . . . does serve as at least a rough attempt

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and return it to Colombia. Colombia was not required to prove its claim; the U. S. government secured a judgment and findings of fact and conclusions of law containing erroneous but never challenged propositions of U. S. law. Without Newton, there is no controversy. The very purpose of the standing requirement "is closely related to, although more general than, the rule that federal court will not entertain friendly suits . . . or those which are feigned or collusive in nature." *Flast v. Cohen,* 392 U.S. 83, 100 (1968).

> to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome."

Sierra Club v. Morton, 405 U.S. 727, 740 (1972) (emphasis added).

The administrative provisions of the customs acts do not impose additional requirements. *See* 19 U.S.C. § 1608. That statute provides that "any person" claiming the merchandise may contest the forfeiture upon filing a claim and posting a bond. *Id.; see also* H. Rep. 1156, 98th Cong., 2d Sess. 134 (1984) *reprinted in* 1984 U.S. Code Cong. & Admin. News 5251 (raising the amount of the required bond; "Section 608 allows *any person* claiming an interest in . . . seized . . . merchandise to judicially contest any forfeiture. . . .") (emphasis added). That Congress knew how to, and did in fact impose some unusual provisions in customs administration is shown by 19 U.S.C. § 1615 which provides for a shifting of the burden of proof to the claimant once the government establishes probable cause for forfeiture. 19 U.S.C. § 1615.

Forfeiture is not favored. *United States v. One 1936 Model Ford V-8 Deluxe Coach,* 307 U.S. 219, 226 (1939). Newton has alleged and testified to facts which demonstrate his stake in contesting the forfeiture. This Court should hold that he has the standing to do so.

B. The Requirement of An Ownership Interest

The monstrance was taken from the possession of James Newton. Even if some additional prudential limitation on standing is appropriate in forfeiture cases, a claimant like Newton meets any reasonable requirements. Newton had actual possession of the monstrance; customs agents seized it from him. Newton's verified claim alleges

that he had actual possession of the monstrance and the exclusive right to its possession. Newton testified that he bought the monstrance for his own account. Verified Claim of James W. Newton; Testimony of James Newton (appendix). The contracts with Uhart show that he had the right to possess the monstrance and had a significant financial stake in it.[5]

The Fifth Circuit held:

> "A claimant who asserts standing to contest forfeiture of property used or imported in violation of federal law must establish that he has *an ownership interest* in the property subject to forfeiture. Claimants holding lesser interests in the property cannot prevent forfeitures, but must await the government's acquisition of title and then apply to the Secretary of the Treasury for remission."

United States v. One Colombian Monstrance, 797 F.2d 1370, 1375 (5th Cir. 1986), *reh. denied,* 802 F.2d 837 (opinion below) (emphasis added). "Bare legal title by one who does not exercise dominion and control over the property has been held insufficient to establish ownership." *United States v. One 1978 Piper Navajo PA-31 Aircraft,* 748 F.2d 316, 319 (5th Cir. 1984). This ownership requirement, the Fifth Circuit indicated, is established "to satisfy the case-or-controversy requirement and 'prudential considerations defining and limiting the role of the courts.'" 797 F.2d at 1375 (quoting *Warth v. Seldin,* 422 U.S. at 518).

Nowhere has the Fifth Circuit explained its position that one must be an owner to have standing to contest the

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5. At the time the monstrance was entered into the United States, the customs laws even provided that "[a]ll merchandise imported into the United States shall be held to be the property to whom the same is consigned. . . ." 19 U.S.C. § 1483(1).

forfeiture. In its opinion on Newton's motion for rehearing, the Fifth Circuit held that "mere physical possession is not sufficient to confer standing to contest forfeiture." *United States v. One 18th Century Colombian Monstrance,* 802 F.2d at 838.

No other circuit court has taken such a narrow view of standing to contest a forfeiture. The Ninth Circuit, in *United States v. 1982 Sanger 24' Spectra Boat,* 738 F.2d at 1046 stated:

> "The court was in error if the basis for its ruling was that only the owner of property may be a claimant. In *United States v. Fifteen Thousand Five Hundred Dollars ($15,500) in U.S. Currency,* . . . we held that '(a) "claimant" is one who claims to own the article or merchandise or to have an interest therein.' In *United States v. Jacobsen* . . . the Court stated that under the Fourth Amendment a seizure of property occurs 'when there is some meaningful interference with an individual's possessory interest in that property.' . . . It is not necessary therefore that a claimant under the forfeiture statute allege ownership. *A lesser property interest such as possession creates standing.*

738 F.2d at 1046 (citations omitted) (emphasis added); *see also United States v. One Hundred Twenty-two Thousand Forty-Three Dollars ($122,043.00) in United States Currency,* 792 F.2d 1470, 1473, n.5 (9th Cir. 1986) (collecting cases).

In *United States v. One 1945 Douglas C-54 (DC-4) Aircraft,* 604 F.2d 27, 28 (8th Cir. 1979), *appeal after remand,* 647 F.2d 864 (8th Cir. 1981), *cert. denied sub nom. Stumpff v. United States,* 454 U.S. 1143 (1982), the Eighth Circuit stated:

> "It is the owner or owners of the res who have standing to challenge a forfeiture. . . . Broadly speak-

> ing, *ownership may be defined as having a possessory interest in the res,* with its attendant characteristics of dominion and control."

Id. (citations omitted) (emphasis added). Following remand, the court held that the claimant Stumpff lacked standing since his "ownership" was merely a subterfuge to conceal the illegal activities of the true owner. *United States v. One 1945 Douglas C-54 (DC-4) Aircraft,* 647 F.2d at 866-67. The court rejected the record title in Stumpff's name, and looked to other incidents of ownership: actual possession, control, and financial stake. *Id.* at 866. The court concluded that Stumpff did not exercise dominion and control over the aircraft. *Id.* at 867.

Newton would meet the standing requirements imposed by the Eighth Circuit; he had possession and exercised dominion and control. The monstrance, unlike a car or an airplane, has no record title per se. Although a document was introduced into evidence showing that Uhart had title to the monstrance, Newton testified that he imposed this requirement to help ensure that he obtained clear title to the work. Testimony of James Newton, pp. 126-27. Newton has no bill of sale, but he had not yet paid the full purchase price.

The Eleventh Circuit has stated that "[o]ne must claim an ownership or possessory interest in the property seized." *United States v. Five Hundred Thousand Dollars,* 730 F.2d 1437, 1439 (11th Cir. 1984).

The Tenth Circuit in *dicta* has stated that a claimant must have "a proprietary interest" in the *res. United States v. $3799.00 in United States Currency,* 684 F.2d 674, 678 (10th Cir. 1982). It looked to the claimant's "actual or constructive possession" of the seized currency. *See id.*

In *United States v. United States Currency in the Amount of $2,857.00,* 754 F.2d 208, 212-13 (7th Cir. 1985), the court held as follows:

> "Any claimant of property that is the subject of a judicial condemnation proceeding must file a claim within ten days after the process has been executed or within such additional time as may be allowed by the court, and must file an answer within twenty days after the filing of the claim. See Fed. R. Civ. P., Supp. Rule C(6). The claim 'shall be verified on oath or solemn affirmation, and shall state the interest in the property by virtue of which the claimant demands its restitution and the right to defend the action.' *Id.* Once the procedural requirements of Rule C(6) are met, a claimant has standing to defend the forfeiture."

Newton met these procedural requirements. *See* Fed. R. Civ. P. (Supp.) C(6) ad. comm. note ("The present rule's emphasis on 'the true and bona fide owner' is omitted, since anyone having the right of possession can claim.) (citations omitted).

The other circuits, like the Seventh Circuit, impose no artificial "standing" requirement to being a claimant in a forfeiture action. This Court itself has reached the merits of a forfeiture action without requiring the claimant to prove his "standing". *United States v. One Ford Coupe Automobile,* 272 U.S. 321, 323 (1926) (the auto was "said to belong to Garth Motor Company," the claimant). Newton would meet the standing requirements in every circuit *except* the Fifth Circuit.

Newton respectfully submits that the position taken by the Fifth Circuit is untenable, insupportable and unjust. His petition for writ of certiorari should be granted so that this Court may establish the standing requirements for a forfeiture action.

QUESTION TWO

The holding that claimant James W. Newton lacked standing, combined with the rejection of his petition for remission, and the approval of the agreed judgment between the governments of the United States and the Republic of Colombia deprived James W. Newton of property without due process of law.

This Court, in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 686-87 (1974), noted that the broad sweep of forfeiture statutes could, in some circumstances, give rise to serious constitutional questions. Where the owner or claimant of the property is unaware of and uninvolved in the illegal activity, and has done everything possible to thwart that activity, it is difficult to conclude that forfeiture serves legitimate purposes and is not unduly oppressive. *See id.* at 689-90; *cf.* 18 U.S.C. § 1963(m); H. Rep. 1030, 98th Cong., Sess. 200-01 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News 3383-84 (showing Congressional intent to protect innocent purchasers of forfeitable property).

The Court has also addressed the remission process, which at least theoretically provides some protection to the innocent owner whose property is forfeited:

> "An express statutory provision permits the innocent owner to prove to the Secretary of the Treasury that the forfeiture was incurred without willful negligence or without any intention on the part of the petitioner * * * to violate the law * * *. 19 U.S.C. § 1618. Upon this showing, the Secretary is authorized to return the seized property upon such terms and conditions as he deems reasonable and just. It is not to be presumed that the Secretary will not conscientiously fulfill this trust, and the courts have intervened when the innocent peti-

> tioner's protests have gone unheeded. When the forfeiture statutes are viewed in their entirety, it is manifest that they are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise."

United States v. United States Coin and Currency, 401 U.S. 715, 721-22 (1971) (citations omitted).

The district court found that Newton was not involved in the illegal importation (if such in fact occurred). Order dismissing Newton's claim, p.1. The agreed judgment of forfeiture in this case reached between the United States and the Republic of Colombia was predicated and conditioned upon the grant of Colombia's petition for remission, which obviously meant that the United States government would reject, without serious consideration, the claim of James Newton. The government in fact rejected his petition on the grounds that "Mr. Newton has failed to establish that he has a good faith interest in the subject property." Letter from Brad Cates, U.S. Department of Justice, December 13, 1985 (see appendix). He is an innocent protester whose claims have gone unheard and unheeded. He could not have prevented the illegal importation of the monstrance since he did not own it or have any interest in it at the time of importation. *See United States v. One 1976 Chevrolet Corvette,* 477 F. Supp. 32, 35 (E.D. Pa. 1979) (forfeiture from innocent purchaser would constitute an unconstitutional deprivation of property).

The government has argued below and the district court judgment holds that the doctrine of relation-back applies to this forfeiture. *United States v. Stowell,* 133 U.S. 1, ___, 10 S. Ct. 244, 247 (1890). Under this doctrine, the forfeiture takes effect immediately upon the

commission of the illegal act. The Court concludes that third parties, even good faith purchasers, cannot obtain rights superior to those of the government after that time. *See id.*

The relation-back doctrine is, however, not applicable to the statute under which the monstrance was forfeited, 18 U.S.C. § 545. The statute provides in relevant part:

> "Merchandise introduced into the United States in violation of this section, or the value thereof, to be recovered from any person described in the first or second paragraph of this section, shall be forfeited to the United States."

18 U.S.C. § 545.

Where a statute provides for foreiture either of the goods themselves or of their value, the relation-back doctrine does not apply. *Caldwell v. The United States,* 49 U.S. (8 How.) 366, 379 (1850). This Court held that "under a statute which declares . . . that either the goods, or the value of them, shall be forfeited," title does not pass to the government at the time of the illegal act so as to cut off the rights of subsequent good faith purchasers. Chief Justice Marshall in *The United States v. Grundy and Thornburgh,* 7 U.S. (3 Cranch.) 337, 351 (1806) reached the same conclusion. *See also United States v. York Street Flax Spinning Co.,* Fed. Cas. No. 16781, 17 Blatchf. 138 (1879); *United States v. Four Cases of Lastings,* Fed. Cas. No. 15,145, 10 Ben. 371 (1879).

Under such a statute, "title to the goods remains in the original owner until the government elects whether to demand the goods or their value, and . . . if, before the election is made, the goods are sold to a bona fide purchaser, the title passes by the sale, and the right of the

government to proceed against the goods is gone." *United States v. York Street Flax Spinning Co.,* Fed. Cas. No. 16,781, 17 Blatchf. at 140; *see also National Atlas Elevator Co. v. United States,* 97 F.2d 940, 943 (8th Cir. 1938) (following this principle). Since the legislative history of the amendment of § 545 which permitted the government to seize the value of the goods as well as the goods themselves specifically refers to the *Atlas Elevator* case, Congress obviously knew and intended that the relation-back doctrine should not apply. S. Rep. No. 2326, 83d Cong., 2d Sess. 8 (1954), *reprinted in* 1954 U.S. Code Cong. & Admin. News 3900, 3907; *see also United States v. Currency Totaling $48,318.08,* 609 F.2d 210, 213 (5th Cir. 1980) (relation-back does not apply to permissive forfeiture statutes).

The government has an alternative remedy against Edward Uhart. It is undisputed that Newton had no part in the illegal importation of the monstrance, and had in fact been given Customs forms correctly describing the country of origin and the nature of the item. The government delayed for ten months after seizure of the property before instituting suit for forfeiture; in fact, Newton himself pushed the government into bringing the forfeiture action by filing suit against the District Director of Customs for return of the monstrance. Delay alone has been held to be a sufficient defense to forfeiture. *See United States v. One 1973 Buick Riveria Automobile,* 560 F.2d 897, 901 (8th Cir. 1977) (citing cases). Newton was held to lack standing to pursue his claim, his petition for remission was denied, and the monstrance was effectively conveyed to Colombia without ever permitting Newton to have an opportunity to be heard on the merits. This course of conduct deprived Newton of his property without due process of law.

CONCLUSION

This Court should review this case because the circuit courts are badly divided on the issue of standing in forfeiture cases, a matter of substantial public concern in view of the increasing number of such actions. In addition, the due process entitlements of innocent third parties in forfeiture proceedings merit this Court's attention. James Newton respectfully requests that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

JAMES LUKIN DROUGHT
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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 85-2643

OPINION

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ONE 18TH CENTURY COLOMBIAN MONSTRANCE Known as the Keeper of the Host of Santa Clara 11.3 Troy Pounds of Gold with Approximately 1,500 Precious and Semi-Precious Stones and Pearls,
Defendant,

JAMES W. NEWTON, Claimant-Appellant.

(Filed August 27, 1986)

Before: Alvin B. Rubin, Henry A. Politz, and Sam D. Johnson, Circuit Judges.

Opinion by Judge Alvin B. Rubin

Appeal from the United States District Court for the Western District of Texas

H. F. Garcia, District Judge, Presiding

SUMMARY

Forfeiture

Appeal from an order dismissing an art dealer's claim to certain property and awarding forfeiture of the property to the United States. Affirmed.

An eighteen century Monstrance (a holy work used by a religious convent during Mass to display the host) was brought into the United States from Colombia by Edward Uhart. Uhart did not obtain the export permit required by Columbian law, and he filed certain certifications with the United States Customs Service that were allegedly fraudulent and misleading. Uhart arranged for Appellant James W. Newton, a San Antonio art dealer, to locate potential buyers for the Monstrance. In exchange for paying Uhart a $200,000 security deposit, Newton had one year in which to sell the Monstrance in Uhart's behalf for $1 million. For successfully completing a sale, Newton would be paid twenty percent of the sale price; if no sale were made, the Monstrance would be returned to Uhart in exchange for the return of the $200,000 deposit. Eventually, U.S. Customs agents seized the Monstrance, and Uhart was indicted for customs violations in connection with the importation of the Monstrance. The United States then filed this action seeking forfeiture of the Monstrance for fraudulent importation. Asserting an "ownership" interest in the Monstrance. Newton filed a claim seeking to challenge the forfeiture. Finding that he lacked standing to contest the forfeiture because he was not the legal or equitable owner of the work, the district court dismissed his claim.

[1] Although Newton contends that the district court erroneously required him to prove that he had an interest in the Monstrance sufficient to satisfy standing requirements before demanding that the United States prove that it had probable cause to seize the Monstrance, standing is a threshold question for entry into a federal court and must be considered by the court even if not raised by the parties. [2] The burden of establishing

standing to contest a forfeiture is on the claimant, [3] who must establish that he has an ownership interest in the property subject to forfeiture. [4] Newton first contends that he must be presumed to be the owner of the Monstrance because he had possession of it at the time it was seized. However, even if he was initially entitled to a presumption of ownership, the government fully rebutted that presumption by evidence that Newton was acting merely as a broker for Uhart. [5] Although Newton contends that he had title to the Monstrance by virtue of certain contracts with Uhart, [6] the documents produced create only a brokerage or consigee relationship. Nothing in the record raises serious doubts about the district court's finding that legal title was retained by Uhart.

[7] Newton's reliance on two cases to support his contention that the term "ownership" as employed for the purpose of adjudging standing to contest forfeiture proceedings should be broader than "title-holder" is misplaced. [8] Those cases involved forfeiture of property used in violation of drug laws and were decided under a different statutory provision. Besides, even if some type of equitable ownership might be sufficient to confer standing to contest forfeiture under the statute dealing with importation of property, Newton has not shown that he possesses any equitable interest in the Monstrance under Texas law. [9] Newton was but a broker or consignee, and his financial stake in the Monstrance was not that of ownership. At most, he had a secured claim or a contingent future interest. [10] As to Newton's final contention that the Uniform Commercial Code as adopted by Texas recognizes the type of transaction

that he and Uhart entered into as a "sale or return" purchase consummated when delivery of the Monstrance was made, "sale or return" purchases of art are specifically exempt from the statute's coverage.

OPINION

ALVIN B. RUBIN, Circuit Judge:

The United States seeks to forfeit property allegedly imported fraudulently by a person who has since become a fugitive from justice. The property was left in the possession of a dealer under a contract giving the dealer the right to sell the property and to retain it until the dealer had been repaid a sum deposited with the owner for that right. The issue in this case is whether the dealer has standing to contest the forfeiture. Because we find that, under the law of Texas, the state in which the contract was made and the property is situated, the dealer is neither the legal nor equitable owner of the property and because the dealer has alleged no other property interest, we affirm the judgment of the district court dismissing his claim and forfeiting the property to the United States.

I.

A long time ago, in the eighteenth century, Don Nicolas de Burgos, a master goldsmith and jeweler to the Royal Court of Spain, traveled to Colombia where, from gold and jewels given by the devout, he made a Monstrance to be used during Mass to display the host for the religious Convent of the Sisters of Santa Clara in Tunja, Colombia. His holy work stands three feet high

and is made of 11.3 troy pounds of gold (melted from 813 gold coins) and 1,500 jewels, including emeralds, pearls, amethysts, diamonds, topaz, and rubies. Its value, fixed by at least one appraisal at $3 million, is enhanced by the fact that the Sisters of Santa Clara and Don Nicholas maintained detailed records recounting how the work was commissioned, the donations collected, and the piece manufactured during the two-year period of its construction.

The Monstrance remained in the possession of the Sisters of Santa Clara for more than 200 years until, in 1978, the Sisters were forced to seek permission from their Archbishop to sell the Monstrance in order to obtain money to repair the roof of the Convent. After the Archbishop authorized the sale, the Sisters offered the Monstrance to the Colombian National Gold Museum in Bogota. Their offer was declined, however, because that museum collects only pre-Colombian Indian art.

What happened thereafter is disputed. The parties to the dispute are Newton, a San Antonio art dealer who claims an interest in the Monstrance, and the governments of the Republic of Colombia and the United States. The two governments contend that, in October, 1978, the nuns sold the Monstrance to Carlos Manzur Aulestia, a Colombian antique dealer, for $31,250 on the condition that the treasure remain in a Colombian museum. Newton contends that Manzur did not buy the Monstrance from the nuns but was retained only to act as their agent for its sale. All parties agree, however, that in 1980, Manzur, acting either for himself or on behalf of the Sisters, offered the Monstrance to Colombia's Gold Museum in Bogota a second time, but the

museum again declined to buy it. The two governments contend that thereafter, in 1981, Manzur, acting as owner, sold the Monstrance to Mr. and Mrs. Joseph Atia for $47,125 and that the Atias resold it to Edward Uhart for $110,000 even before it was delivered to them. Manzur was therefore asked to deliver the Monstrance to Uhart directly.

Newton contends that the Sisters had not sold the treasure either to Manzur or to the Atias but that they sold it directly to Uhart. Because Newton has not been heard on the merits, we take his version of events, although it appears to be immaterial how Uhart came to be in possession, and to claim ownership, of the Monstrance, for all agree that eventually he did buy it and, without obtaining the export permit required by Colombian law, flew with it to New York City in February 1981.

When Uhart arrived in New York, a customs broker acting on his behalf filed a Consumption Entry Packet with the United States Customs Service. The packet, which contained a "bill of sale" from Manzur to Uhart and a certification made by the Sisters of Santa Clara, represented that:

1. The bill of sale was authentic;

2. The bill of sale was a commercial invoice;

3. The information contained in the bill of sale (the date of the sale, the price, and the names of the seller and the buyer) was true and correct and represented an actual transaction;

4. The information contained in the "certification" of the Sisters of Santa Clara (the date of the sale, the

names of the seller and buyer, the presentation to and refusal of purchase by Museum of Gold) was true and correct and represented an actual transaction;

5. The article had been exported from Spain and that the port of lading was Bogota, Spain (rather than Bogota, Colombia); and

6. The article being imported was a "chalice used in religious ceremonies."

Contending that these representations were fraudulent and misleading the United States later filed this forfeiture proceeding.

About one month after he arrived in New York, Uhart telephoned Newton, described the Monstrance, and offered to take it to San Antonio so that Newton might seek a buyer. At first Newton was not interested, but he eventually agreed to locate potential buyers. Newton in turn described the Monstrance to several prominent San Antonio art patrons and suggested that they buy the piece and donate it to the San Antonio Art Museum. Uhart then came to San Antonio and showed the Monstrance to prospective buyers, but no sale agreement was reached at that time.

Shortly thereafter, Uhart left San Antonio with the Monstrance and showed it to collectors in other U.S. cities. Unable to find a buyer, Uhart returned to San Antonio in the summer of 1982 and made a deal with Newton on October 29, 1982. That contract was commemorated in a writing prepared by Newton. The agreement recited that, in exchange for a "confidence deposit" of $200,000 paid to Uhart by Newton or his financial backers, Uhart would place the Monstrance in a San

Antonio bank vault and Newton would be given one year within which to sell the Monstrance in Uhart's behalf for $1 million. For successfully completing the sale, Newton would be paid "twenty percent of sale price with balance to be paid to Edward Uhart." If, at the end of one year, no sale had been made, the Monstrance was to be returned to Uhart in exchange for the return of the $200,000 deposit. If Uhart failed to return the deposit within 60 days after the end of the year, "the Monstrance (was to) become the property of the parties originally extending the two hundred thousand dollars." The agreement also required Uhart to produce "all original documents pertaining to the Monstrance, including those showing proof of purchase, and the legal export import into this country." In compliance with this provision, Uhart produced documentation facially appearing to satisfy these demands.

Newton hoped to obtain the $200,000 security deposit from a new group of prospective buyers, the Guthrie Group, who intended to donate the Monstrance to the San Antonio Art Museum. Due to anticipated unfavorable changes in the tax laws, however, that group abandoned its plans, leaving Newton without a prospective buyer. Newton then decided to put up the $200,000 security deposit himself and, with the aid of guarantees from three associates, borrowed the required amount and delivered the deposit to Uhart.

On December 16, 1982, Uhart and Newton signed a "contract agreement extension," which reiterated Newton's "exclusive right to sell or place" the Monstrance. The extension agreement referred expressly to the October 29, 1982, agreement, and gave Newton the right

to extend that contract for an additional year if he paid—at an unspecified time—an additional $150,000 "confidence deposit."

In mid-November, 1982, Newton showed the Monstrance to Dr. Nancy L. Kelker, Curator of Pre-Colombian and Spanish Colonial Art at the San Antonio Museum of Art, and assured her that Colombian Customs had approved the export of the Monstrance. He also advised her that, although the export requirements were "all taken care of," she should not make any inquires on Colombia regarding the piece and should avoid giving it widespread publicity. This warning aroused Kelker's concern about the legality of the export of the Monstrance so she made inquiries about the work both to George Syage, the Customs broker who had handled the import of the Monstrance into the United States, and to Colombia. Syage told her that the United States Customs office had no copies of any Colombian export documents. The Colombian Museum of Gold later told her that the Monstrance was taken out of Colombia clandestinely. Her concerns thus reinforced, she reported her findings to the United States Customs Service.

Acting on Kelker's report, U.S. Customs agents met Newton at the San Antonio Museum of Art, posing as potential out-of-town purchasers of the Monstrance. After discussing its export with him, the agents identified themselves and seized the Monstrance as evidence of violations of 18 U.S.C. §§ 542 and 2314 (relating, respectively, to entry of goods into the United States by means of false statements and to the transportation of stolen items in foreign commerce). Subsequently, Uhart was indicted for customs violations in connection with his importation of the Monstrance.

The United States then filed this action seeking forfeiture of the Monstrance for fraudulent importation in violation of 18 U.S.C. § 545, the text of which is set forth in the footnote.[1] Uhart cannot be located and is apparently a fugitive from justice. In any event, he has filed no claim challenging the forfeiture. Newton and the Republic of Colombia, however, have filed verified claims seeking to challenge the forfeiture. The United States subsequently asked the district court to strike Newton's claim for lack of standing on the ground that Newton was not the owner of the Monstrance, and the court scheduled an evidentiary hearing on that issue.

At the hearing, Newton asserted an "ownership" interest in the Monstrance, contending that the $200,000 "confidence deposit" represented a down payment on his personal purchase of the work. Newton raised no other kind of claim of interest in the Monstrance and explicitly rejected all alternative characterizations of his interest as "straw men" undeserving of serious consideration. Based on the evidence presented, the district

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1. Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper, or

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sell, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law—

Shall be fined not more than $10,000 or imprisoned not more than five years, or both . . . .

Merchandise introduced into the United States in violation of this section, or the value thereof, to be recovered from any person described in the first or second paragraph of this section, shall be forfeited to the United States . . . .

court found that, although Newton was not involved with the alleged illegal importation of the Monstrance, he also was not the legal or equitable owner of the work and, therefore, had not demonstrated an interest in the seized item sufficient to satisfy the court of his standing to contest its forfeiture.

After the dismissal of Newton's claim, the Republic of Colombia agreed to withdraw its claim and to stipulate to facts sufficient to establish probable cause for the seizure and forfeiture of the Monstrance to the United States in exchange for a promise that the United States would return the Monstrance to Colombia after it had been exhibited for three or more months in the San Antonio museum. There being no one left before the court with standing to challenge either the stipulations or the forfeiture, the district court awarded the Monstrance to the United States.

II.

[1] Newton's first contention is that the district court erroneously required him to prove that he possessed an interest in the Monstrance sufficient to satisfy standing requirements before demanding that the United States prove it had probable cause to seize the Monstrance. In support of the proposition he cites the rule set forth at 19 U.S.C. § 1615: "In all suits or actions . . . brought for the forfeiture of any . . . merchandise . . . seized under the provisions of any law relating to . . . the collection of duties on imports or tonnage, where the property is claimed by any person, the burden of proof shall lie upon the claimant . . . *Provided,* that probable cause shall be first shown for the institution of such suit of

action. . . ." It is, however, elementary that, as a predicate to any action before a federal court, parties must establish that they have proper standing to raise a claim[2] In the absence of a party with sufficient interest, the constitutional limitation of federal court jurisdiction to "cases or controversies" would prevent a federal court from considering the matter. Standing, therefore, is literally a threshold question for entry into a federal court, limiting the exercise of its jurisdiction, and the court must consider the standing of any party even if the issue has not been raised by the parties to the action.[3]

[2] This circuit has held that the burden of establishing standing to contest a forfeiture is on the claimant seeking to come before the court.[4] A claimant need not prove the merit of his underlying claim, but he must be able to show at least a facially colorable interest in the proceedings sufficient to satisfy the case-or-controversy requirement and "prudential considerations defining and limiting the role of the courts."[5]

[3] A claimant who asserts standing to contest forfeiture of property used or imported in violation of federal law must establish that he has an ownership interest

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2. *Worth v. Seldin*, 422 U.S. 490, 517-18, 95 S. Ct. 2197, 2214-15 (1975).

3. *Juidice v. Vail*, 430 U.S. 327, 331-32, 97 S. Ct. 1211, 1215 (1977); *Jenkins v. McKeithen*, 395 U.S. 411, 421, 89 S. Ct. 1843, 1848 (1969).

4. *United States v. $364,960*, 661 F.2d 319, 326 (5th Cir. 1981); *United States v. $48,318.08*, 609 F.2d 210 (5th Cir. 1980); *United States v. One 1967 Chris Craft, 27 foot Fiber Glass Boat*, 423 F.2d 1293, 1294 (5th Cir. 1970).

5. *Worth v. Seldin*, 422 U.S. at 518, 95 S. Ct. at 2215.

in the property subject to forfeiture.[6] Claimants holding lesser interests in the property cannot prevent forfeiture, but must await the government's acquisition of title and then apply to the Secretary of the Treasury for remission.[7] Although recognizing the general applicability of the ownership requirement, Newton advances three theories to support his standing: first, that, pending trial, he should be presumed to be the owner of the Monstrance; second, clear error in the district court's determination that he did not possess title to the Monstrance under the terms of his contract with Uhart; and third, that the concept of ownership sufficient to establish standing is broader than holding legal title.

A.

[4] To support his position that he must be presumed to be the owner of the Monstrance, Newton cites language borrowed by this Court in *United States v. $364,960 in U.S. Currency*[8] from *United States v. Wrights*[9] " 'seizure of property *from someone* is *prima facie* evidence of the person's entitlement' and . . . a claimant 'need not come forward with additional evidence of ownership' unless there are 'serious reasons (presented by the Government or adverse claimants) to doubt [the claimant's] right

6. *General Finance Corp. of Florida South v. United States*, 333 F.2d 681, 682 (5th Cir. 1964); *United States v. One 1952 Model Ford Sedan Automobile*, 213 F.2d 252, 255 (5th Cir.), *cert. denied*, 348 U.S. 862, 75 S. Ct. 87 (1954); *United States v. One 1945 Douglas C-54 (DC-4) Aircraft*, 604 F.2d 27, *after remand*, 647 F.2d 864, 866 (8th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1984).

7. *See* cases *supra* note 5 and 19 U.S.C. § 1617.

8. 661 F.2d 319, 327 (5th Cir. 1981).

9. 610 F.2d 930, 939 (D.C. Cir. 1979).

to the property seized from him.' "[10] Newton, however, made representations to the United States—both orally and through the production of his contracts with Uhart—that raised serious doubt about whether he had acted as anything other than a broker in Uhart's behalf. The government also produced independent evidence, including the information sent to it by Kelker, to support its contention that Newton was merely a broker seeking to earn a commission on sale. Even if Newton was initially entitled by virtue of his claim to possession of the Monstrance to be presumed its owner, the government fully rebutted that presumption. The trial court, therefore, committed no error in requiring Newton to produce proof of his ownership interest.

B.

[5] Newton's contention that he had title to the Monstrance is founded entirely on rights that he contends he acquired both by paying Uhart a $200,000 "confidence deposit" under the terms of the October 29, 1982, contract and by signing the December 16, 1982, contract extension. He concedes that at the time the October 29, 1982, contract was signed, he was working for a commission and trying to sell the Monstrance to the Guthrie group, but he contends that he tendered the $200,000 "confidence deposit" as a down payment on his own purchase of the Monstrance when the Guthrie group abandoned its plan to buy it. At no time, however, has he produced evidence other than his own testimony indicating that the $200,000 deposit was to serve as a

10. 661 F.2d at 327 (emphasis as it originally appeared in *Wright*).

down payment. Newton's receipt from Uhart merely acknowledges receipt "of the $200,000 deposit" and states that "any rights of James W. Newton Associates" under the October contract "are transferrable and specifically assignable to a commercial bank for the purpose of obtaining the aforementioned deposit funds." The December extension, which was written the same day the confidence deposit was tendered, makes no reference to a sale of the Montrance to Newton. Instead, it merely purports to permit an extension of the existing agreement between Newton on Uhart for an additional year in exchange for an "additional confidence deposit" of $150,000.

[6] A trial court's finding that a claimant is not the owner of property is a finding of fact, conclusive unless clearly erroneous.[11] The documents produced create only a brokerage or consignee relationship between Newton and Uhart in which Uhart remained the owner of the Monstrance and Newton paid him $200,000 in order to retain possession of the work, the right to attempt to negotiate a sale, and the opportunity to earn a commission. Nothing in the record raises serious doubt about the correctness of the district court's finding that legal title to the Monstrance was retained by Uhart.

C.

[7] Newton cites two Fifth Circuit opinions to support his contention that the term "ownership" as employed for the purpose of adjudging standing to contest forfeiture proceedings should be considered broader than

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11. *One 1945 Douglas C-54*, 647 F.2d at 866; Fed. R. Civ. P. 52(a).

"title-holder." In *United States v. $47,875 in U.S. Currency,*[12] this court cited legislative history accompanying the enactment of 21 U.S.C. § 881(a)(b) (a statute different from, although similar to, the statute under which the government acted against Newton) that indicated that "the term 'owner' should be broadly construed to encompass any person with a recognized legal *or equitable* interest in the property seized."[13] He seeks further support from a quotation contained in a string-citation parenthetical in *United States v. $364,960 in U.S. Currency,*[14] which states that the right to intervene in a forfeiture proceeding extends to "any person or party having a legally recognized interest in the [seized item] whether he is owner or lienholder or whether that interest is legal or equitable in nature."[15]

[8] Newton's reliance is misplaced. Both *$47,875* and *$364,960* involved forfeiture under 21 U.S.C. § 881(a)(6) of property used in violation of federal drug laws. In 1978, Congress amended 21 U.S.C. § 881(a)(6) to "expand the government's right of forfeiture in drug cases."[16] In partial mitigation, Congress correspondingly expanded the definition of an "owner" who could contest the forfeiture under the innocent-owner exception contained in § 881(a)(6) to include "any person with a

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12. 746 F.2d 291 (5th Cir. 1984) (emphasis added).

13. *Id.* at 293, *citing* Joint Explanatory Statement of Titles II and III, 1978 U.S. Code Cong. & Ad. News 9496, 9522-23.

14. 661 F.2d 319 (5th Cir. 1981).

15. *Id.* at 326, *citing United States v. One 1961 Cadillac Hardtop Automobile,* 207 F.Supp. 693, 698 (E.D. Tenn. 1962).

16. *United States v. One 1977 Cadillac Coupe de Ville,* 644 F.2d 500, 502 (5th Cir. 1981).

recognizable *legal or equitable* interest in the property seized."[17] Congress, however, has not amended 18 U.S.C. § 545, the statute dealing with importation of property under which this action was brought. Even if some kind of equitable "ownership" might be sufficient to provide standing to contest forfeiture under § 545, Newton has not shown that he possesses any equitable interest in the Monstrance under Texas law.

His sole reliance in contending that he possesses an equitable interest in the Monstrance rests on criteria for determining standing the Eighth Circuit set forth in *One 1945 Douglas C-45*.[18] That case involved a claim of standing to contest a forfeiture under 21 U.S.C. § 881 (a)(4) by a claimant who, although listed on the bill of sale and FAA registration certificate as the owner of a plane, did not exercise sufficient dominion and control over it to be its true owner. The Court of Appeals for the Eighth Circuit, consequently, affirmed the lower court's ruling that the holder of the paper title did not, under the circumstances of that case, possess an ownership interest sufficient to warrant standing to intervene in the forfeiture proceedings. Its discussion of control, possession, and financial stake to determine where the true ownership interest lay is not a basis to conclude that these criteria are each independently sufficient for determining ownership.

[9] Nor is Newton's interest in the Monstrance as strong as that found by the court in *One 1945 Douglas C-45* to vest true ownership in a party lacking paper title.

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17. *$47,875*, 746 F.2d at 293.

18. 647 F.2d at 866.

Newton was but a broker or consignee, and his financial stake in the Monstrance was not that of ownership but, at most, that a secured claim or a *contingent* future interest. The same evidence that has made it clear that Newton does not hold legal title to the Monstrance, thus, is more than sufficient to support a finding that he does not hold equitable title either.

D.

[10] Finally, Newton asserts that § 2.326 of the Uniform Commercial Code, which has been adopted by Texas, recognizes the type of transaction that he and Uhart entered into as a "sale or return" purchase consummated when delivery of the Monstrance was made. Section 2.326 does not purport, however, to define when a "sale or return" purchase has been made. It merely defines the rights that creditors of a party who purchases materials for resale possess in such materials. Even if the § 2.326 were generally applicable to determine when a "sale or return" purchase has been made, it would not apply to a situation like Newton's because "sale or return" purchases of art are specifically exempt from the statute's coverage.[19]

III.

We conclude that Newton has not shown that the district court was in error in its findings of fact or in its application of legal principles to those facts. Newton, therefore, cannot challenge the agreements and stipulations entered into by the United States and Colombia

19. Tex. Bus. & Comm. Code Ann. § 2.326(c)(4) (Vernon 1968, as amended 1977).

following dismissal of his claim. If he had no property right, there is no basis for his charge that forfeiture of the Monstrance denied him his property without due process of law.[20] He must seek other remedies for return of his $200,000 deposit. The order of the district court dismissing Newton's claim and awarding forfeiture of the Monstrance to the United States is, therefore, AFFIRMED.

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20. *General Finance Corp. of Florida South v. United States,* 333 F.2d 681 (5th Cir. 1964); *United States v. One 1952 Model Ford Sedan Automobile,* 213 F.2d 252, 255 (5th Cir.), *cert. denied,* 348 U.S. 862, 75 S. Ct. 87 (1954).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL NO. SA-83-CA-2681

UNITED STATES OF AMERICA,
Plaintiff,

v.

ONE EIGHTEENTH CENTURY COLOMBIAN MONSTRANCE, KNOWN AS THE KEEPER OF THE HOST OF SANTA CLARA, 11.3 TROY POUNDS OF GOLD WITH APPROXIMATELY 1,500 PRECIOUS AND SEMI-PRECIOUS STONES AND PEARLS,
Defendant.

(Filed September 27, 1985)

FINAL JUDGMENT

In accordance with this Court's findings of fact and conclusions of law entered upon the stipulated evidence submitted by the United States and the Republic of Colombia,

IT IS ORDERED and ADJUDGED that the final judgment in the above-captioned matter be, and hereby is, entered in favor of the United States and against the Defendant Colombian Monstrance. The Defendant Colombian Monstrance shall be, and hereby is, forfeited to the United States.

IT IS ALSO ORDERED that in light of the stipulated evidence on the United States' case for probable cause to seize and forfeit this Monstrance, it has not been necessary for the Republic of Colombia to present any evidence on its claim filed in this matter, as such claim is moot if and when the Monstrance is forfeited to the United States and remitted to the Republic of Colombia pursuant to the agreement set forth herein. In the event that this cause is remanded to this Court by any higher Court, or the United States does not grant the petition for remission, as conditioned, then the claim of Colombia shall automatically be reinstated without further order from this Court, so that the Republic of Colombia can participate fully in any and all proceedings of remand and assert without prejudice its claim against the Defendant Monstrance.

IT IS ALSO FURTHER ORDERED that in an effort to limit the length and complexity of the probable cause for forfeiture determination, and to relieve the Court of the necessity to hear and determine the claims of the Republic of Colombia in light of the anticipated mootness thereof, the United States and the Republic of Colombia have presented stipulated evidence to this Court and said stipulated evidence has concerned only those grounds supporting forfeiture of this Monstrance to the United States under Title 18, United States Code, Section 545, premised upon false statements made to the United States Customs Service and other violations of Customs laws and regulations. In the event that any claim comes back to this Court, the United States has expressly reserved its right to put on evidence of other grounds supporting the forfeiture of this Monstrance to the United States, in specific, the cause of action under 18 U.S.C. § 2314, as

pleaded in the alternative pleading contained in the verified complaint for forfeiture filed by the United States in this matter.

IT IS ALSO ORDERED that upon acceptance of the Monstrance by the Republic of Colombia, the Republic of Colombia shall pay to the United States Marshal Service for the Western District of Texas, the custodian of the Monstrance all costs incident to seizure and storage of the Monstrance incurred by the United States Customs Service, the substitute custodian acting on the request of the United States Marshal Service.

IT IS ALSO ORDERED that the execution of this judgment shall be stayed pending the disposition of any appeals taken from this judgment to a higher Court.

IT IS SO ORDERED this the 27th day of September, 1985.

/s/ H. F. GARCIA
H. F. Garcia
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL NO: SA-83-CA-2681

UNITED STATES OF AMERICA,
Plaintiff,

v.

ONE EIGHTEENTH CENTURY COLOMBIAN MONSTRANCE, KNOWN AS THE KEEPER OF THE HOST OF SANTA CLARA, 11.3 TROY POUNDS OF GOLD WITH APPROXIMATELY 1,500 PRECIOUS AND SEMI-PRECIOUS STONES AND PEARLS,
Defendant.

(Filed September 27, 1985)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

1. The United States filed its timely complaint for forfeiture of the above-described Monstrance on December 6, 1983. Thereafter, claims were filed by James W. Newton and the Republic of Colombia. Following an evidentiary hearing on the standing of Mr. Newton to contest the forfeiture, this Court, by previous order, struck Mr. Newton's claim on the ground he lacked standing. On the trial of the merits of this forfeiture cause, conducted on September 23, 1985, the United States of America, Plaintiff, and the Republic of Colombia,

Claimant, presented to this Court certain agreed and stipulated uncontested facts supporting the forfeiture of the above-described Monstrance to the United States. These stipulations concern twenty-three uncontested exhibits and the testimony of the following six witnesses: Customs Agent Gaston Wallace, Dr. Nan Kelker, Mr. Helmuth Naumer, Mr. Gerald Staffel, Mr. Carlos Manzur Aulestia, and Customs Inspector Wilbur Don Ramey. In preparing these findings of fact and conclusions of law, the Court has considered these uncontested facts, the pleadings filed in this matter, and the evidence adduced at the evidentiary hearing on the motion to strike the claim of James Newton since some of that evidence adduced by Mr. Newton related to the probable cause to forfeit this Monstrance.

2. On or about October 1, 1978, Carlos Manzur, a Colombian national, obtained the Monstrance from the Nuns of the Order of Santa Clara in Tunja, Colombia, for 2.5 million Colombian dollars.

3. The transfer of the Monstrance to Mr. Manzur was authorized by the community of nuns and the Archbishop of Tunja.

4. During the month of February, 1981, Mr. Manzur transferred the Monstrance to Mr. and Mrs. Joseph Atia in Bogota, Colombia.

5. On or about February 23, 1981, Mr. Manzur received two checks in payment for the Monstrance from Mrs. Atia. Thereafter, Mrs. Atia told Mr. Manzur that Mr. and Mrs. Atia had already resold the Monstrance to Mr. Eduardo Uhart Alarcon (Eduardo Uhart).

6. Mrs. Atia asked Mr. Manzur to deliver the Monstrance to Mr. Uhart, and he did so on February 23,

1981. Before releasing the Monstrance to Mr. Uhart, Mr. Manzur asked to see a receipt showing that Mr. Uhart was the individual who had purchased the Monstrance from Mr. and Mrs. Atia. Mr. Uhart showed Mr. Manzur a receipt which indicated that he has transferred an amount greater than $110,000 U.S. to Mr. and Mrs. Atia's bank account in New York City.

7. The information contained in the nun's declaration (Exhibit 11), which shows that the nun sold the Monstrance to Mr. Uhart is false and fraudulent.

8. The information contained on the "Manzur Letter" invoice (Exhibit 23), which purports to be signed by Mr. Manzur and which states that Mr. Manzur sold the Monstrance to Mr. Uhart on February 24, 1981, was not written nor signed by Mr. Manzur, and the facts related therein are false and fraudulent.

9. Exhibit 1 is a true and accurate copy of the original Customs Entry Packet also known as the Consumption Entry Packet which contains the documents filed with the United States Customs Service with respect to the importation of this Monstrance into the United States on or about February 24, 1981.

10. The following material misrepresentations are made on paper and invoices submitted in connection with the entry of this Monstrance into the United States and contained within the official Consumption Entry Packet:

a. That the "Manzur Letter" was authentic.

b. That the "Manzur Letter" was a commercial invoice.

c. That the information on the "Manzur Letter" (date of sale, price, seller, buyer) was true and correct and represented an actual transaction.

d. That the information on the convent declaration (date of sale, seller, buyer, presentation to Museum of Gold, first refusal by Museum of Gold) was true and correct and represented an actual transaction.

e. That the article was being exported from "Spain" having being made by Nicholas of Burgos, the King's jeweler in Spain.

f. That the article imported was a "chalice used in religious ceremonies."

g. That there were no other invoices, documents, or other information evidencing the sale other than the documents and information submitted and that immediately upon the receipt of such invoices, documents, or information the importer would submit the same to United States Customs Service.

11. Agent Gaston Wallace and Agent Kenneth Brumfield met with Mr. James Newton on January 20, 1983, at the San Antonio Museum of Art (SAMA) posing as potential out-of-town purchasers of the Monstrance who would buy the Monstrance for a wealthy family's private collection and would take the Monstrance away from San Antonio. During that meeting, Mr. Newton made the following statements:

a. Eduardo Uhart was the owner of the Monstrance and Mr. Newton was a broker acting on his behalf.

b. Under no circumstances should Agent Wallace contact anyone from Colombia about the Monstrance.

that there was no written export license from Colombia but that everything had been "taken care of."

12. During the agents' meeting with Mr. Newton, Mr. Newton showed the agents a packet of documents which included a Customs Form 7501 and the nun's declaration. Exhibit 2 is a true and correct copy of the original packet of documents presented by Mr. Newton to the agents in connection with their purchase of the Monstrance. The *pro forma* invoice contained in the Customs official consumption entry (Exhibit 1) lists the country of origin of the Monstrance was "Spain" whereas the copy of the *pro forma* invoice included in the sale packet (Exhibit 2) does not contain any reference to the country of origin.

13. Before meeting with Mr. Newton on January 20, 1983, the United States Customs agents did investigate the contents of the official Consumption Entry Packet that had been filed with respect to the entry of this Monstrance into the United States. The Customs Form 7501 contained in the official Consumption Entry Packet, Exhibit 1, describes the object imported as an "antique," states that the country of origin of the Monstrance and the country of exportation of the Monstrance is "Spain," the port-of-lading of the Monstrance is "Bogota, Spain" and the value of the Monstrance was $100,000. But, the Customs Form 7501, included in the sales packet and shown to the agents by Mr. Newton on January 20, 1983, described the object imported as an "antique Monstrance," showed the country of origin and the country of exportation of the Monstrance as "Colombia," the port-of-lading of the Monstrance as "Bogota, Colombia" and no value was listed on the form.

14. Before meeting with Mr. Newton on January 20, 1983, the Customs agents also met with certain representatives of SAMA who referred to the United States Customs Service the results of certain investigations that they had conducted on the Monstrance. Specifically, the Customs agents met with Dr. Nan Kelker, then an assistant curator of SAMA, who at the express direction of her superiors, had researched the following questions concerning the Monstrance, pursuant to the "Collection Policy" of SAMA: the authenticity of the Monstrance, and the lawful export of the Monstrance from Colombia, the lawful import of the Monstrance into the United States. Dr. Kelker related the following facts to the United States Customs Service:

a. As evidence of lawful import into the United States, Mr. Newton had showed Dr. Kelker a Customs Form 7501 which showed that the antique Monstrance had been exported from Colombia to the United States.

b. Mr. Newton had told Dr. Kelker that authentic export licensing documents from Colombia were on file with George Syage, the customhouse broker who handled the import of the Monstrance into the United States, that she could telephone George Syage herself in order to ask about the forms, that George Syage was expecting her telephone call, and that Dr. Kelker did telephone the Syage brokerage but they did not know Mr. Newton and did not have copies of any Colombian export documents.

c. Dr. Kelker did write to the Colombian Museum of Gold in Bogota, Colombia, in order to inquire about the legitimacy of the Monstrance and was informed by return letter from the Director of the Museum of Gold

that the Monstrance was "taken out of the country clandestinely."

d. When Dr. Kelker asked Mr. Newton about whether or not Colombian customs had approved the export of the Monstrance, Mr. Newton had told Dr. Kelker that it was "all taken care of," but that she shouldn't ask any questions in Colombia, and when the Monstrance was displayed at SAMA, that SAMA should not publicize the Monstrance nationally.

15. Mr. Uhart, the importer of record of the Monstrance, has been convicted of fraud in the Federal Republic of Germany, swindling in Switzerland, and is a fugitive on an arrest warrant issued on an indictment returned by the United States Grand Jury for the Western District of Texas, and is a fugitive on an arrest warrant issued in Colombia.

16. The Monstrance was made in "Colombia" and, therefore, its country of origin is "Colombia" and not "Spain."

17. The Monstrance was imported from Colombia and, therefore, its country of exportation is "Colombia" and not "Spain."

18. The Monstrance left Colombia at Bogota, Colombia, and therefore, the port-of-lading is "Bogota, Colombia," and not "Bogota, Spain."

19. The value of the Monstrance at the time of its importation into the United States was not equal to $100,000 U.S. as indicated in the "Manzur Letter."

20. The Monstrance is not a chalice imported for use in religious ceremonies, but rather, is a Monstrance that was imported into the United States for re-sale.

21. Mr. Uhart did receive the Monstrance from Mr. and Mrs. Atia and not the nuns in Tunja, Colombia. At the time of the importation of this Monstrance into the United States, Mr. Atia was wanted on an arrest warrant lodged with Interpol and Mrs. Atia was wanted for questioning.

Any finding of fact which may properly be deemed to be a conclusion of law may be so considered as a conclusion of law.

Conclusions of Law

1. A forfeiture proceeding is an in rem action brought against seized property on the ground that the property was used illegally. 19 U.S.C. § 1615. *United States v. $364,960,* 661 F.2d 319, 323 (5th Cir. 1981); *One Lot of Emerald Cut Stones v. United States,* ____U.S.____, 93 S. Ct. 489 (1972); *United States v. One 1978 Mercedes-Benz,* 711 F.2d 1297 (5th Cir. 1983). This Court has jurisdiction over this cause under 28 U.S.C. § 1345 and § 1355, and 28 U.S.C. § 1395(b).

2. The United States bears the initial burden of proof as it must show probable cause for institution of the forfeiture suit. Probable cause is defined as reasonable ground for the belief that the property was used illegally. 19 U.S.C. § 1615. "Reasonable ground for belief," in turn, is supported by less than a "prima facie case but more than the mere suspicion." *Bush v. United States,* 389 F.2d 485, 489 (5th Cir. 1968).

3. The question of whether probable cause exists as a legal question for the Court to determine *Buckley v. United States,* 45 U.S. 251 (1846); *Taylor v. United States,* 44 U.S. 197 (1845). The Court may consider

hearsay evidence (*Bush v. United States, supra*), inferences and circumstantial evidence (*United States v. $364,960, supra*).

4. The United States had probable cause to seize the Defendant Monstrance and institute the forfeiture suit under 18 U.S.C. § 545, paragraph (1) and paragraph (5). Under Section 545, paragraph (1), the United States is required to prove and did prove by a preponderance of the evidence probable cause to believe that Mr. Uhart, the importer of record of the Monstrance, did knowingly and willfully make out or attempt to pass through customs a false or forged or fraudulent invoice or other document or paper with intent to defraud the United States. The "Manzur Letter," the nun's declaration, and the false representations contained on the Customs Form 7501 and pro forma invoice submitted to Customs in connection with the entry of the Monstrance were either forged or contained false or fraudulent information. Mr. Uhart attempted to pass these false and fraudulent papers through United States Customs with the requisite intent to defraud the Customs laws. The United States' proof of a violation of Section 545, paragraph (1) established the necessary prerequisite for forfeiture under Section 545, paragraph (5).

5. The United States had probable cause to seize the Defendant Monstrance and institute this forfeiture suit under 18 U.S.C. § 545, paragraph (2) and paragraph (5). Under Section 545, paragraph (2), the United States is required to show and did prove by a preponderance of the evidence probable cause to believe that Mr. Uhart, the importer of record of the Monstrance, fraudulently or knowingly imported the Monstrance into the United States contrary to law. The predicate offenses for the "contrary

to law" provision of Section 545, paragraph (2), in this instance, can be Title 18, United States Code, Section 1001, or Title 18, United States Code, Section 542, or Title 19, United States Code, Section 1484, or Title 19, United States Code, Section 1485.

To support forfeiture under Title 18, United States Code, Section 1001, the United States is required to prove and did prove, by a preponderance of the evidence, probable cause to believe that Mr. Uhart did submit to the United States Customs Service, a department or agency of the United States, a false writing or document knowing the same to contain false, fictitious or fraudulent information relating to the origin of the Monstrance, its value, the purchaser of the Monstrance, the seller of the Monstrance, and the date of the sale transaction, all matters within the jurisdiction of the United States Customs Service in entering merchandise into the United States and all matters with the capability of affecting the exercise of that Governmental function. The United States' proof of a violation of Section 1001 established the necessary prerequisite for forfeiture under Section 545, paragraph (5).

To support forfeiture under Title 18, United States Code, Section 542, the United States is required to prove and did prove, by a preponderance of the evidence probable cause to believe that Mr. Uhart, the importer of record, did enter or introduce or attempt to enter or introduce to the commerce of the United States the Monstrance by means of a false invoice and paper and made a false statement in a declaration to Customs as contained in the official Consumption Entry Packet without reasonable cause to believe in the truth of those statements, said statements concerning the origin of the Monstrance,

its value, the purchaser of the Monstrance, the seller of the Monstrance, and the date of the sale transaction. The United States' proof of a violation of Section 542 established the necessary prerequisite for forfeiture under Section 545, paragraph (5).

To support forfeiture under Title 19, United States Code, Sections 1484 and 1485, the United States is required to prove and did prove, by a preponderance of the evidence, probable cause to believe that Mr. Uhart, the importer of record of the Monstrance, did breach the statutory duty under Sections 1484 and 1485 to present true, unforged, and correct invoices and documents in respect to his Customs entry of the Monstrance into the United States. The United States' proof of a violation of Sections 1484 and 1485 established the necessary prerequisite for forfeiture under Section 545, paragraph (5).

6. The falsehoods and misrepresentations contained in the papers submitted in connection with the Customs entry of this Monstrance, as contained in Exhibit 1, had the following material effect on Customs processing of this entry:

a. The presence of the "Manzur Letter" represented as a commercial invoice on the Customs Form 7501 affected the entry processing of this Monstrance on the basis of the transaction value of the Monstrance and the prompt liquidation of the entry at the transaction value;

b. The "Manzur Letter" represented as a commercial invoice showing the purchase price of the Monstrance to be $100,000 U.S. affected Customs' duty to appraise merchandise prior to entry, even if the merchandise would be entered duty-free;

c. The inclusion of the nun's declaration had the capability of influencing a Customs officer not to question the entry;

d. The description of the Monstrance as a "chalice used in religious ceremonies" had the capability of influencing a Customs officer to admit the Monstrance, a duty-free antique, as a duty-free religious object, since if the Monstrance appeared to be entitled to two duty-free classifications under the Tariff Schedules, in-depth investigation into facts surrounding entry would be discouraged;

e. The listing of the country of origin of the Monstrance as Spain, the country of exportation of the Monstrance as Spain, the port-of-lading of the Monstrance as Bogota, Spain, and the maker of the Monstrance as "Nicholas of Burgos, the *King's* jeweler," had the natural effect and capability of preventing and discouraging any inquires by United States Customs Officers in the country of Colombia;

f. The elimination of the Atias' from the chain of title on the Monstrance had the natural effect of preventing the Customs officers from investigating into the Atias' background and learning of the existing warrant;

g. The mis-statements, falsehoods, and fraudulent statements contained in the invoice and documents filed with the United States Customs in connection with the entry of this Monstrance adversely affected Customs' duty to collect statistics on exports and to forward accurate information to the United States Census Bureau, as it is required to do so by law;

h. The underrevaluation of the Monstrance on the "Manzur Letter," the commercial invoice submitted by the importer in connection with the importation of this Monstrance, had the natural effect of tending to distort the bonding requirements and liquidated damages stipulated in Customs bonds, as the lower the value of the imported merchandise on the invoice, the lower any subsequently assessed penalties would be.

7. The false "Manzur Letter," the false information contained on the nun's declaration, the false statements with respect to the country of origin, the value and the description of the Monstrance, are each a material misrepresentation because each is an act or omission capable of influencing a decision which United States Customs made in connection with entry of this merchandise.

8. The United States Customs agents needed no warrant prior to seizing this Monstrance on January 20, 1983, because the agents had probable cause to seize the Monstrance at the culmination of their meeting with Mr. Newton. The agents had probable cause to believe that the Monstrance had been imported in the United States in violation of Title 18, United States Code, Section 542 and Section 2314, and further, the Monstrance was seizable as evidence of other violations of United States law including Title 18, United States Code, Section 545 and Title 18, United States Code, Section 1001. The probable cause to seize and forfeit the Monstrance on January 20, 1983, was based on statements made by Mr. Newton to the Customs agents on January 20, 1983, on information communicated to United States Customs by Dr. Kelker prior to seizure,

on the agents' assessment of Mr. Newton's demeanor, on the agents' comparison of Customs papers shown by Mr. Newton to them on January 20, 1983, and their own knowledge of the contents of the Customs Form 7501 contained within the official Consumption Entry Packet filed with United States Customs.

9. Once probable cause is found to exist, the burden shifts to any claimant to show by a preponderance of the evidence that the property was neither used or intended to be used illegally. Title 19, United States Code, Section 1615. *Wood v. United States,* 410 S. Ct. 342 (1842). To contest a forfeiture action as a claimant, a claimant must first demonstrate an interest in the seized property sufficient to satisfy the Court of his standing as a claimant. *United States v. $364,960,* 661 F.2d 319, 326 (5th Cir. 1981).

10. In this case, the Republic of Colombia has elected not to present any evidence on its claim filed in this matter, as its claim is moot if and when the Monstrance is forfeited to the United States and remitted to the Republic of Colombia by the United States, as conditioned. In the event that this cause is remanded to this Court by any higher Court, then the claim of Colombia shall automatically be reinstated without further order of this Court so that the Republic of Colombia can participate fully in any and all proceedings on remand.

11. Title 18, United States Code, Section 545 is a mandatory forfeiture statutory, in that it provides that property "shall" be forfeited to the United States upon the commission of the unlawful act giving rise to forfeiture. *United States v. $48,318.08,* 609 F.2d 210 (5th Cir. 1980).

12. In the case of mandatory forfeiture statutory such as Title 18, United States Code, Section 545, the forfeiture relates back to the time of the illegal act that rendered the property forfeitable. *United States v. Stowell,* 133 U.S. 1 (1890); *United States v. 1967 Chris Craft 27-foot Fiberglass Boat,* 423 F.2d 1293, 1294 (5th Cir. 1970). Under the relation-back doctrine, interests in property which are acquired after the illegal act giving rise to the forfeiture are cut off. *United States v. One Piece of Real Estate,* 57 F.Supp. 723, 725 (W.D. Tex. 1983); *United States v. 1967 Chris Craft, supra,* 423 F.2d at 1294.

13. Under the allegations made by Claimant Newton in his own pleadings in this matter, Mr. Newton did not acquire any interest in the Monstrance until *after* the importation of the Monstrance into the United States, and therefore, the doctrine of relation back cuts off that interest.

14. The fact that there may have been no loss of revenue in the Monstrance's importation into the United States is no defense to a Section 545 forfeiture. *United States v. Kurfess,* 426 F.2d 1017 (7th Cir.), *cert. denied,* 400 U.S. 830 (1970). Thus, the fact that the Defendant Monstrance was imported "duty-free" into the United States is not a defense to the forfeiture of the Monstrance to the United States.

15. Declaration of an item at Customs is no defense to forfeiture under Title 18, United States Code, Section 545. *United States v. Kurfess, supra,* 426 F.2d at 1019. Thus, the fact that the importer of record of this Monstrance may have declared the Monstrance to Customs does not prevent the forfeiture of the Monstrance to the United States.

16. The probable cause proof presented to this Court by way of stipulated proof agreed to between the remaining parties to this lawsuit has concerned only those grounds supporting forfeiture of this Monstrance to the United States under Title 18, United States Code, Section 545 premised upon false statements made to the United States Customs Service and other violations of Customs laws and regulations. In the event that any claim comes back to this Court, the United States has expressed and reserved its right to put on evidence of other grounds supporting forfeiture of this Monstrance to the United States, as indicated in the alternative pleading contained in the verified claim for forfeiture.

17. The Defendant Monstrance is subject to seizure and forfeiture under Title 18, United States Code, Section 545, Title 18, United States Code, Section 542, Title 18, United States Code, Section 1001, Title 19, United States Code, Section 1484, Title 19, United States Code, Section 1485, and the United States is entitled to a judgment of forfeiture.

18. The execution of the judgment of forfeiture shall be stayed pending final disposition of any and all appeals taken from this judgment.

Any conclusion of law which properly may be deemed to be a finding of fact may be so considered as a finding of fact.

ENTERED this the 27th day of September, 1985.

/s/ H. F. GARCIA
H. F. Garcia
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CAUSE NO. SA-83-CA-2681

UNITED STATES OF AMERICA
Plaintiff

v.

ONE EIGHTEENTH CENTURY
COLOMBIAN MONSTRANCE
Defendant

(Filed September 13, 1985)

ORDER

At issue is the government's motion to strike the claim of James W. Newton. The motion was originally denied based upon this Court's belief that evidence was necessary to support the government's allegations. Upon a request for reconsideration, an evidentiary hearing was held to determine Newton's standing to contest the forfeiture of the monstrance. Having considered the pleadings, the evidence and the argument of counsel, the Court is of the opinion the motion to strike should be granted.

The facts are that sometime in 1980, Newton was contacted by Edward Uhart to advise him the monstrance would be on the market. Newton is an art dealer, among other things, and Uhart owned an art gallery in Barcelona, Spain. The men had engaged in previous dealings with each other including the sale of a painting, and other

trades. After Uhart described the monstrance, Newton told him that he was not interested in it.

The monstrance was brought into the United States on February 24, 1981, without the knowledge or assistance of Newton. Within a month, Uhart again contacted Newton asking him to reconsider the piece. Uhart wanted to sell the monstrance. Though Newton again expressed a lack of interest, further persuasion by Uhart resulted in Newton's agreement to examine the monstrance. When he saw it, he was impressed. He contacted several persons who examined it.

Approximately three months later, Uhart contacted Newton wanting him to find someone who would acquire the piece for donation to the San Antonio Museum of Art. Several investors, the Guthrie group, heard about the monstrance and called Newton. On October 27, 1982, they executed a letter to Newton evidencing their intent to purchase the monstrance and to deposit $200,000 in escrow to show their good faith. Two days later, Uhart and Newton entered into an agreement providing that Newton would be the sole representative for Uhart regarding the exclusive right for the sale and placement of the monstrance, for a period of one year. When the Guthrie group purchase fell through, Newton arranged to pay the $200,000 himself as a confidence deposit. In December, 1982, Uhart and Newton entered into a contract extension agreement providing for additional time to consummate placement of the monstrance. An additional confidence deposit of $150,000 was to be paid by Newton. Approximately one month later, the monstrance was seized by custom's agents from Newton at the San Antonio Museum of Art. Uhart has been indicted for

smuggling violations arising out of the importation of the monstrance into the United States. He is currently a fugitive.

The government contends that Newton had no ownership interest in the monstrance and, thus, lacks standing to contest its forfeiture. Newton concedes that he was working for a commission at the time the Guthrie group sought the purchase, but that the contract extension agreement was intended to make him the owner. Before a person may challenge a forfeiture of money or property, he must first demonstrate an interest in the seized item sufficient to satisfy the Court of his standing to contest the forfeiture. *United States v. $364,960.00 in U.S. Currency,* 661 F.2d 319, 326 (5th Cir. 1981). It is well established that only an owner has such an interest. *General Finance Corp. of Florida South v. United States,* 333 F.2d 681, 682 (5th Cir. 1964). A sufficient ownership interest may be evidenced in a number of ways, including showings of actual possession, control, title and financial stake. *United States v. One 1945 Douglas C-54 Aircraft,* 647 F.2d 864, 866 (8th Cir. 1981), *cert. denied,* 454 U.S. 1143 (1982). When title to the seized property cannot be determined, either because of the nature of the property (such as money) or lack of proof of ownership, seizure of property from a person's possession is prima facie evidence of that person's entitlement to it. *United States v. Wright,* 610 F.2d 930, 939 (D.C. Cir. 1979). Unless there are serious reasons to doubt a person's right to such property, he need not come forward with additional evidence of ownership. *Ibid.* In this case, Newton was in possession and control of the monstrance at the time of seizure. This is not a situation, however, with no definitive indications of ownership. All of the evidence

is consistent with the conclusions that Uhart was the owner of the monstrance, and that Newton was merely his broker or consignee.

Newton disclaimed any interest in the monstrance on two occasions and denied involvement in its importation. The contact with the Guthrie group resulted from Uhart's desire to have Newton locate a buyer for the monstrance. As conceded by Newton, he was not a member of that group, and his sole interest in the sale was the receipt of a commission. The sale would be between Uhart and the Guthrie group. The October 29th contract, drafted by Newton, clearly reflects these arrangements. Despite Newton's assertions, the contract extension agreement, also drafted by Newton, did not alter his position as broker. Once the Guthrie group plan fell through, Newton himself paid the $200,000 confidence deposit to retain his right to act as Uhart's sole representative to sell the monstrance. In view of the fact that the piece had been appraised at three million dollars, it is rational to believe Uhart wanted some financial security for his interest before relinquishing possession of the monstrance to Newton.

The extension agreement nowhere indicates that Newton was to buy the monstrance. It merely provided for an extension of the original contract and payment of another confidence deposit as additional security. The extension agreement again refers to Newton's "exclusive right to sell or place" the monstrance, and recites that all terms of the original contract are to remain in full force and effect. It further provides as did the original contract, that Newton would receive twenty percent of the sales price. The certificate of Uhart, attached to the extension agreement,

certifies that he is the sole owner of the monstrance. *If* the monstrance was not sold within the extended period and *if* Uhart did not refund the confidence deposits to Newton, *then* the monstrance would become Newton's property. Though Newton concedes he has spoken with Uhart several times since the seizure and could have requested a refund of his deposits, he has not done so. Nothing in Uhart's letter of November 25, 1983 to Newton alters the Court's construction of the extension agreement.

Newton is an intelligent man and chose not to consult an attorney to draft the contracts. His testimony establishes that the first contract meant what it said. Both agreements are consistent with one another as they pertain to Newton's relationship to Uhart and the monstrance. Had Newton wanted to own the monstrance, he could easily have drafted an agreement reciting that he was to buy the monstrance from Uhart. The extension agreement does no more than allow Newton to continue as Uhart's broker. The provision for "forfeiture" of the monstrance to Newton upon the occurrence of certain conditions does not create an ownership interest. The facts revealed that Newton never requested and Uhart never refused to refund the deposits. Additionally, Uhart's letter in November, 1983, created an indefinite extension of the contract. The time for return of the deposits by Uhart has not yet, therefore, passed.

Newton has argued the applicability of Section 2.326 of the Uniform Commercial Code in support of his claim to title. Initially, it should be noted that provision concerns the rights of creditors of the person to whom goods are delivered for sale. Title to such goods vest in the person to whom the goods are delivered. Since the govern-

ment is proceeding against the monstrance, and not against Newton as one of his creditors, the applicability of Section 2.326 is doubtful. Assuming it does otherwise apply, delivery of works of art is excepted according to subsection (c).

The government has also sought to strike Newton's claim based upon a decision in *United States v. Stowell,* 133 U.S. 1, 10 S. Ct. 244, 33 L.Ed. 555 (1890). *Stowell* stands for the proposition that forfeiture occurs, and relates back to, the moment of illegal use, precluding a third person from acquiring a legally recognizable interest in the property after the illegal use. The Court agrees with Newton that until a forfeitable event has been shown, the *Stowell* doctrine should not be applied. *See, e.g., United States v. Currency Totalling $48,318.00,* 609 F.2d 210 (5th Cir. 1980).

The Court concludes that Newton was not the owner of the monstrance and that his interest in it, therefore, was not sufficient to justify his standing to contest the forfeiture. The government's motion to strike shall be granted.

It is therefore, ORDERED that the claim of James W. Newton to the monstrance be, and it hereby is, STRICKEN.

SIGNED this 13th day of September, 1985.

/s/ H. F. GARCIA
H. F. Garcia
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 85-2643

D.C. Docket No. SA-83-CA-2681

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ONE 18th CENTURY COLOMBIAN MONSTRANCE KNOWN AS THE KEEPER OF THE HOST OF SANTA CLARA 11.3 TROY POUNDS OF GOLD WITH APPROXIMATELY 1,500 PRECIOUS AND SEMI-PRECIOUS STONES AND PEARLS,
Defendant,

JAMES W. NEWTON,
Claimant-Appellant.

(Filed November 5, 1986)

Appeal from the United States District Court for the Western District of Texas

Before RUBIN, POLITZ, and JOHNSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from in this cause is affirmed.

IT IS FURTHER ORDERED that claimant-appellant pay to plaintiff-appellee the costs on appeal, to be taxed by the Clerk of this Court.

August 27, 1986

ISSUED AS MANDATE: November 3, 1986.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 85-2643

OPINION

UNITED STATES OF AMERICA,
Plaintiff-Appellee.

v.

ONE 18th CENTURY COLOMBIAN MONSTRANCE KNOWN AS THE KEEPER OF THE HOST OF SANTA CLARA 11.3 TROY POUNDS OF GOLD WITH APPROXIMATELY 1,500 PRECIOUS AND SEMI-PRECIOUS STONES AND PEARLS.
Defendant,

JAMES W. NEWTON,
Claimant-Appellant.

(Filed October 22, 1986)

Before: Alvin B. Rubin, Henry A. Politz, and Sam D. Johnson, Circuit Judges.

Per Curiam

Appeal from the United States District Court for the Western District of Texas

H. F. Garcia, District Judge, Presiding

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion August 27, 1986, 5 Cir., ____F.2d____)

OPINION

PER CURIAM:

In Newton's petition for rehearing, he takes the position that he is entitled to require, or that the district court must sua sponte require, the Government to demonstrate probable cause for the forfeiture before examining his standing to raise that question. This puts the cart before the horse. In order to contest the forfeiture of the Monstrance to the United States under 18 U.S.C. § 545, Newton must first establish that he has standing. There is no case or controversy, in the constitutional sense, absent a dispute between parties who have a real interest in its resolution.[1] Even assuming, as the panel did, that Newton made his contract concerning the Monstrance innocently and in complete good faith, to establish standing, Newton must show at least a facially colorable claim to an ownership interest in the work.

Newton continues to insist that he possesses either a legal or an equitable ownership interest in the Monstrance or some sort of right arising out of physical possession that accords him standing. As we held in our previous decision, however, Newton has been unable to establish a facially colorable ownership interest of either a legal or equitable nature and mere physical possession is not sufficient to confer standing to contest forfeiture. Any presumption of ownership he enjoyed due to the fact that the Monstrance was seized from his possession was overcome by the clear meaning of the contracts he and Uhart

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1. *Allen v. Wright*, __U.S.__, 104 S. Ct. 3315, 3324-25 (1984); *Schlesinger v. Reservists Committee To Stop the War*, 418 U.S. 208, 226, 94 S. Ct. 2925. 2934-35 (1974); *Baker v. Carr*, 369 U.S. 186, 204, 82 S. Ct. 691, 703 (1962).

signed. Newton's own representations about his dealings with Uhart and his efforts to locate a buyer, and the evidence and explanation proffered by the Government as the basis of its decision to seize the work. The face of the relevant legal documents and the versions of the facts offered by every interested party show that Newton was acting solely as Uhart's broker. Only Newton's bald assertion of ownership, which is unaccompanied by factual allegations sufficient to raise serious question about the intent expressed on the face of the contracts, suggests otherwise. No reasonable person could conclude on the basis of the undisputed facts and Newton's representation of the disputed, objective facts that a sale of the Monstrance to Newton was consummated or intended. Finally, because we found that Newton did not possess even an equitable ownership interest in the Monstrance, we refrained in our earlier opinion, as we do now, from deciding whether such an interest would, if established, confer standing.

The Petition for Rehearing is DENIED, and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

APPENDIX B

UNITED STATES CONSTITUTION

AMENDMENT V

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES STATUTES

18 U.S.C. § 545

§ 545. Smuggling goods into the United States

Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law—

Shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section.

Merchandise introduced into the United States in violation of this section, or the value thereof, to be recovered from any person described in the first or second paragraph of this section, shall be forfeited to the United States.

The term "United States", as used in this section, shall not include the Philippine Islands, Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or Guam.

19 U.S.C. § 1608

§ 1608. Seizure; claims; judicial condemnation

Any person claiming such vessel, vehicle, merchandise, or baggage may at any time within twenty days from the date of the first publication of the notice of seizure file with the appropriate customs officer a claim stating his interest therein. Upon the filing of such claim, and the giving of a bond to the United States in the penal sum of $250, with sureties to be approved by such customs officer, conditioned that in case of condemnation of the articles so claimed the obligor shall pay all the costs and expenses of the proceedings to obtain such condemnation, such customs officer shall transmit such claim and bond, with a duplicate list and description of the articles seized, to the United States attorney for the district in which seizure was made, who shall proceed to a condemnation of the merchandise or other property in the manner prescribed by law.

19 U.S.C. § 1615

§ 1615. Burden of proof in forfeiture proceedings

In all suits or actions (other than those arising under section 1592 of this title) brought for the forfeiture of any vessel, vehicle, merchandise, or baggage seized under the provisions of any law relating to the collection of duties on imports or tonnage, where the property is claimed by any person, the burden of proof shall lie upon such claimant; and in all suits or actions brought for the recovery of the value of any vessel, vehicle, merchandise, or baggage, because of violation of any such law, the burden of proof shall be upon the defendant:

Provided, That probable cause shall be first shown for the institution of such suit or action, to be judged of by the court, subject to the following rules of proof:

(1) The testimony or deposition of the officer of the customs who has boarded or required to come to a stop or seized a vessel or vehicle, or has arrested a person, shall be prima facie evidence of the place where the act in question occurred.

(2) Marks, labels, brands, or stamps, indicative of foreign origin, upon or accompanying mechandise[1] or containers of merchandise, shall be prima facie evidence of the foreign origin of such merchandise.

(3) The fact that a vessel of any description is found, or discovered to have been, in the vicinity of any hovering vessel and under any circumstances indicating contact or communication therewith, whether by proceeding to or from such vessel, or by coming to in the vicinity of such vessel, or by delivering to or receiving from such vessel any merchandise, person, or communication, or by any other means effecting contact or communication therewith, shall be prima facie evidence that the vessel in question has visited such hovering vessel.

1. So in original. Probably should read "merchandise".

FEDERAL RULES OF CIVIL PROCEDURE

Supplemental Rule C(6)

(6) Claim and Answer; Interrogatories. The claimant of property that is the subject of an action in rem shall file his claim within 10 days after process has been executed, or within such additional time as may be allowed by the court, and shall serve his answer within 20 days after the filing of the claim. The claim shall be verified on oath or solemn affirmation, and shall state the interest in the property by virtue of which the claimant demands its restitution and the right to defend the action. If the claim is made on behalf of the person entitled to possession by an agent, bailee, or attorney, it shall state that he is duly authorized to make the claim. At the time of answering the claimant shall also serve answers to any interrogatories served with the complaint. In actions in rem interrogatories may be so served without leave of court.

APPENDIX C

EXCERPT FROM THE TESTIMONY OF
JAMES W. NEWTON
BEFORE THE HONORABLE H. F. "HIPPO" GARICA

September 6, 1985

* * *

[69]

and this letter was sent to me on pieces of their interviews or conversations with the director Helmuth Nowner of the San Antonio Museum Association. So, I assumed that probably Mr. Staffel drew this up. I really don't know.

Q. All right.

So, you got these two agreements in late October of '82, and let me ask you now; did the Guthrie group consummate the purchase of the monstrance as contemplated by the October agreement?

A. No, they did not.

Q. Why not, sir?

A. They called me and told me that there were things in the tax laws that were anticipated changes insofar as donations of art objects were concerned.

Q. Uh-huh.

A. And they really needed to research that somewhat more before trying to get a group together to donate this. They were doing this on the basis of a tax advantage.

Q. Was it your understanding that there had been some tax law changes?

A. No, sir.

Q. Okay.

A. What they stated was that not had the tax laws been changed, but they were being re-evaluated, and that possibly the museum procedure or the procedure for giving gifts to museums on a tax

[70]

basis might be changed.

Q. Okay.

Were they able, therefore, to consummate the agreement within the ten day period or thirty day period that is in this letter?

A. No, sir.

Q. Okay.

Now, when you were advised of that, Mr. Newton, what reaction did you have concerning this monstrance and its—and the continuing interest that you may have in it?

A. Well, I understood that if the Guthrie group could not comply with putting up the $200,000 that it required, and if they were not able to consummate the prescribed terms within the period of time, of course, we might lose the monstrance here in the community.

Q. All right.

Now, did the Guthrie group ever put up their $200,000?

A. No, sir.

Q. Okay.

Did they ever put up any money?

A. No, they did not.

Q. All right.

Were you fearful that it might be lost at that point because there was no viable purchaser in the community?

A. Yes, this was the agreement with Mr. Uhart and it had not

[71]

been complied with. And, of course, he could take the piece back and we could lose it all together.

Q. Well, what did you do to try to avoid that contingency, that is the loss of the monstrance?

A. Well, I spoke with several people further stating what the dilemma was and that I was going to need to return the piece if something was not worked out where a purchase agreement or purchase of the piece could be consummated.

Q. Who did you talk to—did you look for some financial help at that time?

A. Well, I had hoped to find someone else who could possibly purchase it or donate it or use the same plan that the Guthrie group had proposed. I did speak to several friends about this, and their comment was, "Why don't you do it yourself?"

Q. Did you do it yourself?

A. I did.

Q. And did you pay $200,000?

A. I did.

Q. Now, had you ever in your life made a loan that large before for anything?

A. Nothing that large; no, sir.

Q. Did you have the cash available?

A. No, I did not.

Q. Did you need help in order to raise the $200,000?

A. I did.

[72]

Q. And how did you raise the $200,000, Mr. Newton, to put down on the monstrance?

A. There were three gentlemen who were friends of mine. Who, the same ones, had suggested that I do this myself—buy the piece and make arrangements to extend it as a donation. They came forward and agreed to be co-signers in a note if I wished to proceed.

Q. All right.

If I may, your Honor, approach the witness, hand the witness what I am marking Defendant's Exhibit F—

THE COURT: Yes, you may.

MR. WHEATLEY: And ask you, sir, if this is a copy of the agreement of December 8 of '82 with the gentlemen you mentioned?

A. Yes, sir; that is the original agreement.

Q. Now, what was the purpose of that agreement made on December 8, 1982, with Messrs. Atwell, Hopkins, and McGrath?

A. Well, the purpose was to assist me in getting a loan so I could proceed with the purchase of the monstrance and within the prescribed period of time and try to work out the same situation where we could sell shares or work something out to give this piece to the San Antonio museum.

Q. All right.

Your Honor, we move the admission into evidence of Defendant's Exhibit F.

[73]

MS. MATHY: May I see it, please?

MR. WHEATLEY: Certainly. Here is the copy and you are welcome to inspect the original.

MS. MATHY: No objections.

MR. TAYLOR: No objections.

THE COURT: Will be received into evidence.

(Defendant's Exhibit F admitted)

MR. WHEATLEY: Now, let's look at this agreement for a moment, Mr. Newton.

First of all, was Mr. Atwell and Hopkins and McGrath acquaintances or friends of yours?

A. Yes, sir.

Q. Was it in your judgment necessary to have their backing in order to raise the $200,000 in order to purchase the monstrance?

A. Well, it was necessary to have someone's backing and they certainly came forward and offered.

Q. And as a result of those negotiations, and you had this agreement—let me look at the first paragraph of it. It says, "The purpose of this agreement is to set forth the duties and responsibilities of the parties hereto in regard to the acquisition, custody, sale of, distribution of proceeds received from, and expenses incurred in connection with the monstrance which is the subject of a contracted dated October 29, 1982, by and between Edward Uhart and Newton and et cetera." Do you see that?

[74]

A. Yes, sir.

Q. And by this agreement in the second paragraph, "Atwell, Hopkins and McGrath agree to cause a loan to be made to you for $200,000 for a year", is that right?

A. Yes, sir.

Q. But that you would be responsible to the lender for the repayment of that loan, wouldn't you?

A. That's correct.

Q. "Custody of the monstrance will be in accordance with the agreement of the parties hereto, and as dictated by the lender. At the expiration of the loan term, you gentlemen agree to cause the funds advanced to be made available for an additional period of time not to exceed sixty days to allow Uhart to return the deposit as per the contract dated October 29, 1982", is that right?

A. That's right.

Q. And, then, in the third paragraph, "That the parties agree to extend the time period beyond the term contemplated, Atwell, Hopkins, and McGrath will have the option to cause additional funds, as required, to be advanced to Mr. Newton under the same terms and conditions", is that correct?

A. Right.

Q. And, "In the event that you could sell the monstrance for an amount in excess of one million dollars, the proceeds of that sale will be divided equally among those four people", is that

[75]

right?

A. The amount in excess; yes, sir.

Q. All right.

And in the next to the last paragraph, it was agreed that "During the time of the possession and right to sell contemplated by the contract of October 29, and during the time in which Atwell, Hopkins, and McGrath are in any way liable to a lender for the funds advanced

hereunder, the monstrance will be secured in a bank of the choice of James Newton and at least one of the other parties and may be withdrawn only in the presence of at least two of the parties hereto; is that right?

A. Yes, sir; that is correct.

Q. Now, in connection with that agreement, did the gentlemen agree to guarantee a loan that you made at Mercantile Bank and Trust of San Antonio?

A. Yes, sir; they did.

Q. I will now hand you what I am marking as Defendant's Exhibit F-1 and ask you, sir, if this is a true and correct copy of that guarantee agreement dated December 8, 1982?

A. This is a copy of that document; yes, sir.

Q. Your Honor, we move admission of Defendant's Exhibit F-1.

MS. MATHY: No objections.

MR. TAYLOR: No objections.

THE COURT: Will be received into evidence.

(Defendant's Exhibit F-1 admitted)

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL NO. SA-83-CA-2681

UNITED STATES OF AMERICA,
Plaintiff

v.

ONE EIGHTEENTH CENTURY COLOMBIAN MONSTRANCE, KNOWN AS THE KEEPER OF THE HOST OF SANTA CLARA, 11.3 TROY POUNDS OF GOLD WITH APPROXIMATELY 1,500 PRECIOUS AND SEMI-PRECIOUS STONES AND PEARLS,
Defendant.

(Filed March 29, 1985)

CLAIM OF JAMES W. NEWTON

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Claimant JAMES W. NEWTON, acting by and through the undersigned attorney, and files this his claim asserting his right to possession of the Monstrance, hereinafter referred to as "the property".

In support of his claim, Mr. Newton would show the Court the following:

I.

At some time after February 24, 1981, but at a date not recalled, Mr. Newton was advised by one Eduardo Uhart that the latter had purchased in Colombia and

imported into this country the property. Mr. Uhart advised Mr. Newton that the importation has been made at New York. Mr. Uhart gave no indication, either then or later, that there was anything irregular or in any way improper about his importation of the property, if any there was.

II.

Thereafter, on more than one occasion Mr. Uhart brought the property to San Antonio and at times left it with Mr. Newton to show to prospective purchasers.

III.

On information and belief, at least some of the time when the property was not in Mr. Newton's possession, it was being examined by museum officials, including those at the Denver Art Museum.

IV.

In the late summer or early fall of 1982, Mr. Newton began negotiations to acquire from Mr. Uhart the exclusive right to possession of the property. These negotiations culminated on December 16, 1982, with Mr. Newton's payment to Mr. Uhart on $200,000 through a bank in New York. In return, Mr. Uhart's granting Mr. Newton an exclusive option and right to acquire the property for $800,000, including the $200,000 paid over as stated above.

V.

At no time prior to December 16, 1982, did Mr. Newton have any indication whatsoever that there was anything at all irregular, improper, or otherwise not in order about the property or its importation into the United States, if any there was.

VI.

As an innocent acquirer for value and without notice before any institution of forfeiture proceedings, as against the Plaintiff, Mr. Newton is entitled to the right of possession and disposition of the property in accordance with his contract made with Mr. Uhart.

VII.

Plaintiff has been repeatedly advised of Mr. Newton's right to exclusive and undisturbed possession of the property but has wholly refused to return it to him, to his continuing damage. Moreover, Plaintiff has consistently and repeatedly refused to specify with any particularity what offense it alleges was committed in connection with the importation of the property into the United States, if any there was.

WHEREFORE, premises considered, Mr. Newton prays that the property be returned to him forthwith and that he recover costs and such damages against Plaintiff as to which he may show himself justly entitled.

Respectfully submitted,

OPPENHEIMER, ROSENBERG, KELLEHER & WHEATLEY, INC.

By: /s/ SEAGAL V. WHEATLEY
Seagal V. Wheatley
711 Navarro, Suite 620
San Antonio, Texas 78205
512/224-2000
State Bar No.: 21252000

APPENDIX E

BC:HW:mjc
185-76-347

U.S. DEPARTMENT OF JUSTICE

Washington, D.C. 20530

Dick Terrell Brown, Esquire
900 Milam Building
San Antonio, Texas 78205

Re: United States v. One Eighteen Century
Monstrance SA-83-CA-2681

Dear Mr. Brown:

The Petition for Remission or Mitigation of Forfeiture of the referenced Monstrance filed by you on behalf of James W. Newton has been denied. The petition has been denied because the evidence uncovered discloses that Mr. Newton has failed to establish that he has a good faith interest in the subject property. *See* 28 C.F.R. § 9.5(c) (1), (2) and (3). The United States Attorney is being advised that the petition has been denied.

If you have any newly acquired evidence or evidence not previously considered which you believe would constitute a basis upon which the Attorney General might reverse his denial of the petition, you may apply for reconsideration of our action. In that event, any such application should be sent directly to and received in this office within 20 days from the date of this letter. Two copies of any such application should be furnished simultaneously to Assistant United States Attorney Pam-

ela Mathy at the United States Attorney's Office, Western District of Texas, 655 E. Durango Boulevard, Hemisfair Plaza, San Antonio, Texas 78206 who is being advised that in the event she does not receive copies of such an application within 20 days from the date of this letter she is to proceed with the forfeiture. You may, of course, still contest the forfeiture in court, assuming the presence of a valid defense, by filing an Answer to the Complaint for Forfeiture if you have not already done so and if the time to Answer has not expired.

Sincerely yours,

BRAD CATES
Director
Asset Forfeiture Office
Criminal Division

Supreme Court, U.S.
FILED
MAR 25 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-1232 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES W. NEWTON,
Petitioner,
v.
THE UNITED STATES OF AMERICA, et. al.
Respondents.

BRIEF OF RESPONDENT REPUBLIC OF COLOMBIA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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76 88

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	III
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. The District Court Properly Held a Pretrial Evidentiary Hearing to Determine the Preliminary Issue of Newton's Standing	6
II. The District Court Properly Found That Newton Was Not the Owner of the Monstrance	7
III. The District Court Properly Found That Newton Lacked Standing to Contest the Forfeiture of the Monstrance	9
A. Newton never had a property interest in the Monstrance itself; all he ever had was a contingent interest in the proceeds of any sale and an interest in the return of his security deposit	11
B. Physical possession alone does not confer standing where there is substantial evidence that a person other than the claimant is the true owner	15
C. Even if the standing issue might have been decided differently in another circuit, the ruling below was correct because the courts will not entertain the claims of a fugitive from justice or one who derives his claim therefrom	21
IV. The Proceedings Resulting in the Forfeiture of the Monstrance to the United States Did Not Deprive Newton of Property Without Due Process	24

TABLE OF CONTENTS — (Continued)

	Page
CONCLUSION	27
CERTIFICATE OF SERVICE	28
AFFIDAVIT OF FILING BY MAIL	29
SELECTED RECORD EXCERPTS AND TRIAL EXHIBITS	1r
Selected Record Excerpts from Hearing Before the Honorable H. F. "Hippo" Garcia September 6, 1985	2r
Selected Record Excerpts from Hearing Before the Honorable H. F. "Hippo" Garcia September 9, 1985	26r
Selected Defendant's Exhibits from Hearing Before the Honorable H. F. "Hippo" Garcia September 6, 1985	30r

TABLE OF AUTHORITIES

	Page
Allen v. Trust Co. of Ga., 326 U.S. 630 (1946)	9
Baker v. United States, 722 F.2d 517 (9th Cir. 1983)	10
Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974)	7, 8, 19
Commonwealth of Pennsylvania v. Rizzo, 530 F.2d 501 (3d Cir.), *cert. denied sub nom. Fire Officers Union v. Pennsylvania*, 426 U.S. 921 (1976)	25
Conforte v. Commissioner, 692 F.2d 587 (9th Cir. 1982)	21
Doherty v. Rutgers School of Law-Newark, 651 F.2d 893 (3d Cir. 1981)	7
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Ivers v. United States, 581 F.2d 1362 (9th Cir. 1978)	27
Juidice v. Vail, 430 U.S. 327 (1977)	6
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McCraw v. United Ass'n of Journeymen & App. of Plumbing, etc., 341 F.2d 705 (6th Cir. 1965)	8
Molinaro v. New Jersey, 396 U.S. 365 (1970)	21
Monrosa v. Carbon Black, Inc., 359 U.S. 180 (1959)	23
Munoz-Mendoza v. Pierce, 711 F.2d 421 (1st Cir. 1983)	6
NAACP, Boston Chapter v. Harris, 607 F.2d 514 (1st Cir. 1979)	7
Ramos Colon v. United States Attorney for D. Puerto Rico, 576 F.2d 1 (1st Cir. 1978)	25
Simons v. United States, 541 F.2d 1351 (9th Cir. 1976)	12
Sommerville v. United States, 376 U.S. 909 (1964)	23
Sutherland v. St. Lawrence County, 101 A.D. 299, 91 N.Y.S. 962 (N.Y. App. Div. 1905)	17
The W. Talbot Dodge, 15 F.2d 459 (S.D.N.Y. 1926)	11, 14
United States v. All That Tract & Parcel of Land, 602 F. Supp. 307 (N.D. Ga. 1985)	25, 26
United States v. $83,320 in United States Currency, 682 F.2d 573 (6th Cir. 1982)	21
United States v. $11,580 in United States Currency, 454 F. Supp. 376 (M.D. Fla. 1978)	20, 25

TABLE OF AUTHORITIES — (Continued)

Page

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United States v. Five Hundred Thousand Dollars, 730 F.2d 1437 (11th Cir. 1984) 10, 11, 20, 24, 26

United States v. $45,940 in United States Currency, 769 F.2d 583 (9th Cir. 1985) 21

United States v. LaFatch, 565 F.2d 81 (6th Cir. 1977), *cert. denied sub nom. LaFatch v. MM Corp*, 435 U.S. 971 (1978) 20

United States v. 1982 Sanger 24' Spectra Boat, 738 F.2d 1043 (9th Cir. 1984) 15, 16

United States v. One 18th Century Colombian Monstrance, 797 F.2d 1370 (5th Cir.), *reh'g denied*, 802 F.2d 837 (5th Cir. 1986) ..... 4, *passim*

United States v. One Gray Samsonite Suitcase Model 200, 637 F. Supp. 1162 (E.D. Mich. 1986) 10

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United States v. One Hundred Twenty-Two Thousand Forty-Three Dollars ($122,043) in United States Currency, 792 F.2d 1470 (9th Cir. 1986) 16, 18

United States v. One 1980 49-foot Defender Yacht Lobster Vessel, 566 F. Supp. 106 (S.D. Fla. 1983) 26

United States v. One 1981 Datsun 280ZX, 563 F. Supp. 470 (E.D. Pa. 1983) 14

United States v. One 1945 Douglas C-54 (DC-4) Aircraft Serial Number 22186, 604 F.2d 27 (8th Cir. 1979), *after remand*, 647 F.2d 864 (8th Cir. 1981), *cert. denied sub. nom. Stumpff v. United States*, 454 U.S. 1143 (1982) 10, 13, 14, 25

United States v. One 1971 Porsche Coupe Auto., VI No. 9111100355, 364 F. Supp. 745 (E.D. Pa. 1973) 14

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TABLE OF AUTHORITIES — (Continued)

	Page
United States v. One 1977 36 Foot Cigarette Ocean Racer, 624 F. Supp. 290 (S.D. Fla. 1985)	14, 19
United States v. Palmer, 565 F.2d 1063 (9th Cir. 1977)	18
United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973)	6
United States v. South Bend Community School Corp., 710 F.2d 394 (7th Cir.), *cert. denied sub nom. Brookins v. South Bend Community School Corp.*, 466 U.S. 926 (1984)	24
United States v. Stowell, 133 U.S. 1 (1890)	26
United States v. $364,960 in United States Currency, 661 F.2d 319 (5th Cir. Unit B 1981)	6, 10, 18
United States v. $3,799.00 in United States Currency, 684 F.2d 674 (10th Cir. 1982)	20
United States v. United States Currency Amounting to Sum of $30,800.00, 555 F. Supp. 280 (E.D.N.Y. 1983), *aff'd*, 742 F.2d 1444 (2d Cir. 1983)	26
United States v. United States Currency in the Amount of $2,857.00, 754 F.2d 208 (7th Cir. 1985)	27
United States v. Wright, 610 F.2d 930 (D.C. Cir. 1979)	18, 20

STATUTES

19 U.S.C. § 1608	14
19 U.S.C. § 1615	25

FEDERAL RULES OF CIVIL PROCEDURE

Rule C(6) (Supp.)	10

TREATISES

Stern, Gressman & Shapiro, *Supreme Court Practice*, § 4.4 (1986)	23

NO. 86-1232

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES W. NEWTON,
Petitioner,
v.
THE UNITED STATES OF AMERICA, et. al.
Respondents.

BRIEF OF RESPONDENT REPUBLIC OF COLOMBIA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

In February of 1981, one Edward Uhart purchased the Great Monstrance of Santa Clara (the "Monstrance") in Colombia, South America. The Monstrance, a three-foot high, solid gold, jewel-studded liturgical object, is used in the Catholic Mass to display the host. See page 31r herein. The Monstrance, which had been commissioned in the eighteenth century by the order of the Sisters of Santa Clara in Tunja, Colombia, and had been displayed at the convent for nearly 200 years, was sold by the Sisters on condition that it remain in a Colombian museum. (Appendix 5a.) However, shortly after acquiring the Monstrance, Uhart took the Monstrance out of Colombia without obtaining an export permit and imported it into the United States.

After bringing the Monstrance to the United States, Uhart contacted Petitioner-Claimant James Newton

("Newton"), a San Antonio art dealer. Newton had known Uhart since 1976 and had engaged in a number of business dealings with him since that time. (R. 16-21.)[1] Uhart had telephoned Newton from Colombia to discuss the Monstrance some six months to one year before importing the Monstrance into the United States. (R. 25 and 29.)

In October, 1982, Newton and Uhart signed a written agreement giving Newton the right to earn a 20% commission on the sale of the Monstrance. Uhart agreed to give Newton limited possession of the Monstrance for one year for the purpose of attempting a sale, in exchange for Newton's making a confidence deposit of $200,000 which would be returned when Newton returned the Monstrance.[2] In connection with this transaction, Uhart signed a document certifying that *Uhart* was the "sole owner" of the Monstrance. Newton made several attempts to sell the Monstrance, and in this connection the Monstrance was inspected by Dr. Nan Kelker, Curator of Pre-Columbian and Spanish Colonial Art at the San Antonio Museum of Art. When Dr. Kelker asked Newton whether Colombian Customs had approved the export of the Mon-

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[1] All Record references are to the trial court proceedings held on September 6 and 9, 1985. Selected portions of those proceedings together with certain trial exhibits are reproduced at the end of this Brief. All Appendix references are to the Appendix in Newton's Petition.

[2] Newton delivered the $200,000 confidence deposit to Uhart in the form of two cashier's checks, one for $135,000 and one for $65,000. However, after Uhart acknowledged receipt of the two checks, he immediately returned the $65,000 check to Newton to satisfy a $65,000 debt that Uhart owed Newton in connection with several prior business transactions between the two men. (R. 80-81; Def. Ex. I; R. 78, 79.)

strance, Newton told Dr. Kelker that, although it was "all taken care of," she should not make any inquiries in Colombia regarding the Monstrance. Newton further advised Dr. Kelker not to publicize the Monstrance nationally while it was on display at the San Antonio Museum of Art. (Appendix 29a.)

Based on her conversation with Newton, Dr. Kelker became concerned that the Monstrance was "hot." As a result of Dr. Kelker's further investigation and her communications with the United States Customs Service, United States Customs officials determined that the customs declaration used to import the Monstrance into the United States contained materially false statements and they seized the Monstrance. (Appendix 28a.) Thereafter, the United States initiated a proceeding to forfeit the Monstrance. Uhart was charged with and indicted for fraudulent importation of the Monstrance, but is presently a fugitive from justice. (Appendix 10a and 29a.) Uhart has also been convicted of fraud in the Federal Republic of Germany, of swindling in Switzerland, and is a fugitive on an arrest warrant issued in Colombia. (Appendix 29a.)

Although Uhart did not return to the United States to file a claim in the forfeiture proceedings, he has communicated several times by letter and telephone with Newton about the status of those proceedings since they were initiated. (R. 104-106.) Newton has not reported these conversations to any law enforcement authority despite his admission that he knew Uhart was a fugitive from justice. (R. 106.) However, Newton filed a claim in the forfeiture proceedings asserting that he was "an innocent acquirer for value and without notice." The Republic of

Colombia also filed a claim and participated fully in the proceedings below.

Early in the action, the United States moved to strike Newton's claim on the ground that, because he was not the true owner of the Monstrance, he lacked standing to contest its forfeiture. After denying the Government's motion on the ground that the relevant facts were in dispute, District Court Judge H.F. Garcia ordered an evidentiary hearing to determine the issue of Newton's standing. At the hearing, Newton claimed that he was an innocent "bona fide purchaser" of the Monstrance, and that the documents entered into between him and Uhart had resulted not in a brokerage agreement, but in a sale. The trial court found that Newton was merely Uhart's broker for the purpose of selling the Monstrance, and dismissed Newton's claim. There being no one left before the court challenging the forfeiture, the district court awarded the Monstrance to the United States.[3] The Fifth Circuit Court of Appeals affirmed. *United States v. One*

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[3] The Republic of Colombia offered no evidence in support of its claim in the district court because the Attorney General of the United States, in a separate proceeding, granted the petition for remission filed by the Republic of Colombia pursuant to which it was determined that the Monstrance would be returned to the Republic of Colombia in the event that the United States prevailed in the forfeiture proceeding. (Appendix 36a.) As a result, the Republic of Colombia conditionally withdrew its claim in the district court and did not oppose the forfeiture. (R. 43-45.) (September 9, 1985 hearing.) However, the district court held that in the event that its judgment is remanded by a higher court, the claim of the Republic of Colombia will be automatically reinstated without further court order so that the Republic of Colombia may participate in any proceedings on remand. (Appendix 21a.)

The Republic of Colombia also participated as a party in briefing and oral argument before the Fifth Circuit.

18th Century Colombian Monstrance, 797 F.2d 1370 (5th Cir.), *reh'g denied,* 802 F.2d 837 (5th Cir. 1986) (Appendix 1a-19a).

SUMMARY OF ARGUMENT

The district court properly required Newton to establish his standing at a pretrial evidentiary hearing. Standing is a preliminary issue, and this Court has never held that a trial court may not require evidence when the relevant facts relating to standing are in dispute.

Furthermore, the cases cited by Newton on the standing issue which allegedly conflict with the Fifth Circuit Court of Appeals' decision in this case are based on entirely different facts. The Fifth Circuit Court of Appeals' decision in this case is consistent with decisions of other circuits considering similar facts in civil forfeiture actions.

Last, Newton has not been deprived of property without due process by the conduct of the forfeiture proceedings. Because he was properly denied the right to participate in the forfeiture proceedings, and because he has not challenged the trial court's findings that he had no legal or equitable interest in the Monstrance, he had no constitutional rights with respect to those proceedings.

ARGUMENT

I.

The District Court Properly Held a Pretrial Evidentiary Hearing to Determine the Preliminary Issue of Newton's Standing.

Newton suggests that the district court erred in ordering a pretrial evidentiary hearing on the issue of Newton's standing, but instead should have accepted Newton's allegations of ownership at face value. In support of this argument, Newton cites decisions of this Court holding that litigants must allege facts sufficient to show they have standing. The requirement that a litigant allege certain facts, however, does not limit a court to considering only those allegations when those allegations are in dispute. This Court has held that standing is clearly a preliminary matter, and that a district court should not reach the merits of an action if a party has no standing to raise the merits. *Juidice v. Vail*, 430 U.S. 327, 331-32 (1977). In fact, in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.15 (1973), this Court suggested that a pretrial evidentiary hearing is a proper means to resolve disputed facts relating to standing. This Court stated in *SCRAP* that even though the district court in that case did not err by failing to take evidence on the issue of standing, the defendants could have requested an evidentiary hearing on standing if they believed the facts underlying the plaintiffs' standing allegations were in dispute.

The district court's decision to conduct a pretrial evidentiary hearing on standing is not novel. Courts in the First, Third, and Fifth Circuits have required such hearings. *See Munoz-Mendoza v. Pierce,* 711 F.2d 421, 425-26 (1st Cir. 1983); *United States v. $364,960 in United States*

Currency, 661 F.2d 319, 326 (5th Cir. Unit B 1981); *Doherty v. Rutgers School of Law-Newark*, 651 F.2d 893, 898 (3d Cir. 1981); *NAACP, Boston Chapter v. Harris*, 607 F.2d 514, 526 n.15 (1st Cir. 1979). Newton has made no principled argument for his assertion that a pretrial evidentiary hearing would be improper to determine an issue that this Court has expressly held should be determined before reaching the merits. The district court properly held a pretrial evidentiary hearing to determine the disputed issue of Newton's interest in the Monstrance.

II.

The District Court Properly Found That Newton Was Not the Owner of the Monstrance.

Newton contends that he is an innocent owner or good faith purchaser of the Monstrance and that he therefore has a defense to its forfeiture under this Court's decision in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). (Newton Petition 5.) He bases his ownership claim on his own self-serving testimony given at the evidentiary hearing on standing that he bought the Monstrance from Edward Uhart for his own account, that he borrowed the money to make the down payment, and that he paid all of the interest and some principal on the note. (Newton Petition 6 and 9.)

The district court did not, however, credit Newton's ownership claim and in a detailed decision filed September 13, 1985, Appendix 39a-44a, found that "[Edward] Uhart was the owner of the monstrance and that Newton was merely his broker or consignee." (Appendix 42a.) See also Findings of Fact No. 11a filed September 27, 1985 (Appendix 26a). Indeed, the contract extension agree-

ment which Newton signed and which he acknowledged contains the only documentary evidence of his alleged ownership (R. 165-166) has attached to it a certificate from Edward Uhart which certifies that *Uhart is the sole owner of the Monstrance.* The Court of Appeals reviewed this same documentary evidence and found no error in the trial court's finding of fact that Newton was not the owner of the Monstrance. As the Court of Appeals stated:

> A trial court's finding that a claimant is not the owner of property is a finding of fact, conclusive unless clearly erroneous. The documents produced create only a brokerage or consignee relationship between Newton and Uhart in which Uhart remained the owner of the Monstrance and Newton paid him $200,000 in order to retain possession of the work, the right to attempt to negotiate a sale, and the opportunity to earn a commission. Nothing in the record raises serious doubt about the correctness of the district court's finding that legal title to the Monstrance was retained by Uhart.

(*See* Appendix 15a.)

Newton does not contend in his Petition that the district court's findings of fact on the ownership of the Monstrance were clearly erroneous. Accordingly, Newton's argument that he is an innocent owner within the meaning of *Calero-Toledo* and that he was deprived of his property without due process of law presents no appellate issue for review by this Court. Supreme Court Rule 23(1)(c). *Cf. Lewis v. City of Grand Rapids,* 356 F.2d 276, 278 (6th Cir. 1966), *cert. denied,* 385 U.S. 838 (1966); *McCraw v. United Ass'n of Journeymen & App. of Plumbing, etc.,* 341 F.2d 705, 710 (6th Cir. 1965). But even if Newton had properly challenged in this Court the

findings of fact in the courts below, this Court has repeatedly held that it is not "a court for correction of error in fact finding" and "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Manufacturing Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). No such obvious and exceptional show of error is even claimed, let alone made out in this case. Furthermore, in cases involving concurrent findings of two lower courts, this Court has held that such findings will be accepted by this Court without reexamination of the underlying evidence. *Allen v. Trust Co. of Ga.*, 326 U.S. 630, 636 (1946).

In short, Newton has not raised a due process claim that is properly reviewable in this Court. The courts below found as a matter of fact that he had neither a legal nor an equitable interest in the Monstrance. Those findings are not challenged on appeal as clearly erroneous. So long as those findings remain undisturbed on appeal, they undermine any due process claim Newton might otherwise possess.

III.

The District Court Properly Found that Newton Lacked Standing to Contest the Forfeiture of the Monstrance.

Newton also claims that he has standing to contest the forfeiture of the Monstrance even if the district court was correct in holding that he did not own it. (Newton Petition 6.) Newton argues that he should have been allowed to contest the forfeiture because (1) he had a substantial financial stake in the Monstrance and (2) he had possession of the Monstrance at the time it was

seized by customs officials. (Newton Petition 6 and n.3, 8.) He claims that the Fifth Circuit improperly required him to be an owner of property in order to have standing to contest a forfeiture and that this "ownership" requirement conflicts with decisions in other circuits which supposedly allow standing based on possession of the seized property. (Newton Petition 10-12, 17.)

A close reading of the cases shows, however, that there is nothing out of the ordinary in the decision below and any supposed conflict is more apparent than real. Newton's assertion that no circuit court of appeals other than the Fifth Circuit imposes limitations on standing in forfeiture actions more stringent than those imposed by Rule C(6) of the Supplemental Rules of Civil Procedure for Certain Admiralty and Maritime Claims, is simply wrong.[4] Courts following a long, consistent, and unquestioned line of cases have always required that a party seeking to challenge a forfeiture as a "claimant" demonstrate a legally sufficient property interest in the seized item. *Baker v. United States*, 722 F.2d 517, 518 (9th Cir. 1983); *United States v. Five Hundred Thousand Dollars*, 730 F.2d 1437, 1439 (11th Cir. 1984); *United States v. $364,960 in United States Currency*, 661 F.2d 319, 326 (5th Cir. Unit B 1981); *United States v. One 1945 Douglas C-54*

[4] Contrary to Newton's suggestion, Rule C(6) does not establish the full extent of standing requirements under the forfeiture statutes. Rule C(6) is a procedural rule only, *United States v. One Gray Samsonite Suitcase Model 200*, 637 F. Supp. 1162, 1166 (E.D. Mich. 1986), and does not purport to modify the substantive law relating to forfeiture under the applicable forfeiture statutes. This is apparent from the fact that Rule C(6) was adopted in 1966 and numerous courts of appeals in subsequent decisions have continued to require a claimant to demonstrate a property interest in the seized item. *See* text below.

(DC-4) Aircraft Serial Number 22186, 604 F.2d 27, 28 (8th Cir. 1979), *after remand*, 647 F.2d 864 (8th Cir. 1981), *cert. denied sub nom. Stumpff v. United States*, 454 U.S. 1143 (1982); *United States v. Fifteen Thousand Five Hundred Dollars ($15,500) United States Currency*, 558 F.2d 1359, 1360 (9th Cir. 1977); *The W. Talbot Dodge*, 15 F.2d 459 (S.D.N.Y. 1926). Despite Newton's assertions, no circuit has dispensed with this requirement for standing.

A. Newton never had a property interest in the Monstrance itself; all he ever had was a contingent interest in the proceeds of any sale and an interest in the return of his security deposit.

Newton makes much in his Petition of his large financial stake in the Monstrance. However, as found by the Fifth Circuit, he never had a legal or equitable interest in the Monstrance itself. (Appendix 17a and 49a.) As a broker, all he ever had was a contingent interest in earning a commission from the sale of the Monstrance and in the return of his $200,000 security deposit. Under existing case law in other circuits, neither interest is sufficient to confer standing in a forfeiture case.

In *United States v. Five Hundred Thousand Dollars*, 730 F.2d 1437 (11th Cir. 1984), the Government seized $900,000 in currency that was alleged to be the proceeds of an illegal drug operation and later obtained a default judgment forfeiting the currency to the United States. Approximately eight months after the decree of forfeiture was entered, one Fernandez, a money changer, moved to set aside the default judgment. Fernandez contended that he had transferred $900,000 in pesos to the prior owners of the funds in reliance on a representation that $900,000 in dollars had been transferred to his New York bank

account. He claimed to have standing to contest the forfeiture because: (1) he would have earned a commission on making the exchange from dollars to pesos, and (2) he was the owner of $500,000 of the $900,000 because the wire transfer order had been made out at the time the funds were seized even though the funds had not been actually transferred. The Court of Appeals rejected both arguments. It held that Fernandez never submitted any evidence "showing he actually bought the $900,000 seized with the $900,000 he apparently expended." 730 F.2d at 1440. The Court concluded by saying:

> Fernandez may well have a chose in action against either the people to whom he disbursed the $900,000 in pesos, or the people who represented to him that the wire transfer had taken place. *He has no interest in the seized funds sufficient to confer upon him standing to reopen the default judgment, however.*

Id. (emphasis added).

Similarly, in this case, Newton may well have a claim against Uhart both for the return of the security deposit[5] and for the lost commission because it was Uhart's violation of the customs laws that defeated Newton's opportunity to earn a commission. However, these collateral and contingent interests do not constitute a sufficient property interest in the Monstrance itself to confer standing to contest its forfeiture.

A similar result was reached by the Ninth Circuit in *Simons v. United States,* 541 F.2d 1351 (9th Cir. 1976), and *United States v. Fifteen Thousand Five Hundred Dollars ($15,500) United States Currency,* 558 F.2d 1359 (9th

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[5] However, as of the date of the trial court proceedings, Newton had not even asked Uhart for the return of his security deposit. (R. 148-49.)

Cir. 1977). In *Simons*, the alleged claimant was denied standing to contest the forfeiture of an automobile even though he had co-signed the promissory note that financed the automobile and was likely to incur substantial financial loss because of the forfeiture. His "interest" was too remote to give him standing because it was an unsecured debt and conferred upon him "no legal title or lien interest in the automobile." *Simons,* 541 F.2d at 1351.

Similarly, in *Fifteen Thousand Five Hundred Dollars,* a claimant was denied standing to contest the forfeiture of currency taken from her safety deposit box because she would state only that she was the signatory on the safety deposit box and paid fees for its opening, not that she was the owner of the currency itself. The Ninth Circuit held that in all cases where standing is allowed "the real party in interest claims some interest in the seized article or merchandise itself." 558 F.2d at 1360. Assertion of an interest only in the storage of the seized article was found insufficient. *See also United States v. One 1945 Douglas C-54, etc.,* 647 F.2d 864, 865-66 (8th Cir. 1981) (receipts for money expended on storage and maintenance of aircraft, receipts for rental of equipment to repair aircraft, and receipts for $10,000 deposit toward the purchase price of aircraft held insufficient to confer standing where other evidence showed superior ownership claim in another party.)

As these cases demonstrate, other circuits have required claimants to show a legal or equitable interest in the seized article or merchandise itself and have consistently denied standing to claimants who could show nothing more than an interest in a commission to be earned from the sale of the article or the existence of an un-

secured debt involving the article.[6] Contrary to Newton's assertions, the Fifth Circuit did not require him to prove that he was the owner of the Monstrance; it did, however, require him to show that he had a legal or equitable interest in the Monstrance itself, something he was unable to do. (Appendix 48a.) The decision below is not only entirely consistent with existing case law in other circuits where courts have resolved competing claims to the same property,[7] but is eminently sound. If every person with some contingent or collateral interest in a seized article could contest its forfeiture, including bailees, repairmen, unsecured creditors and brokers, the forfeiture laws could never be effectively enforced.

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[6] The position of most circuits that the "interest" must be in the article or merchandise itself is also consistent with the language of the statute. 19 U.S.C. § 1608 provides in pertinent part that "Any person claiming such vessel, vehicle, aircraft, merchandise or baggage may ... file with the appropriate customs officer a claim stating his interest *therein*." (Emphasis added.) The Circuit Courts are therefore on sound statutory ground in requiring claimants to show an existing interest in the merchandise itself rather than a collateral interest in the proceeds of a sale or in a related security deposit.

[7] *See United States v. One 1945 Douglas C-45 (DC-4) Aircraft, Serial Number 22186,* 604 F.2d 27 (8th Cir. 1979), *after remand,* 647 F.2d 864 (8th Cir. 1981), *cert. denied sub nom. Stumpff v. United States,* 454 U.S. 1143 (1982); *United States v. One 1977 36 Foot Cigarette Ocean Racer,* 624 F. Supp. 290 (S.D. Fla. 1985); *United States v. One 1981 Datsun 280ZX,* 563 F. Supp. 470 (E.D. Pa. 1983); *United States v. One 1971 Porsche Coupe Auto., V.I. No. 9111100355,* 364 F. Supp. 745 (E.D. Pa. 1973); *The W. Talbot Dodge,* 15 F.2d 459 (S.D. N.Y. 1926).

B. Physical possession alone does not confer standing where there is substantial evidence that a person other than the claimant is the true owner.

Newton also complains of the Fifth Circuit's ruling that "mere physical possession is not sufficient to confer standing to contest forfeiture." (Appendix 48a.) (Newton Petition 10.) He relies on *dicta* in decisions from other circuits for the proposition that mere physical possession of the Monstrance at the time of seizure is sufficient to confer standing. However, Newton's cases are not in conflict with the decision of the Fifth Circuit below.

In *United States v. 1982 Sanger 24' Spectra Boat,* 738 F.2d 1043 (9th Cir. 1984), the Government sought forfeiture of a 24-foot boat under statutes dealing with narcotics offenses. Two claimants contested the forfeiture but declined to make any statement regarding ownership of the boat on the ground that such statements might tend to incriminate them with respect to pending criminal charges against them. The Government moved to strike the claims on the ground that the claimants had no standing because they did not assert any ownership interest in the boat, and the district court, without allowing claimants to respond to the Government's motion, granted the motion and struck the claims. The Ninth Circuit reversed saying in *dictum* that a lesser property interest such as possession creates standing and remanded the case to the trial court to give the claimants an opportunity to allege "the specific property interest they have in the properties." 738 F.2d at 1047.

The *1982 Sanger* case is not in conflict with the Fifth Circuit's decision in this case. To begin with, the *1982 Sanger* case does not constitute a holding that mere physical possession of the boat at the time of seizure

would have conferred standing on the claimants. All the Ninth Circuit actually did in that case was give the claimants an opportunity to allege facts short of actual ownership to support their claim. What these facts would be and whether the circuit would then find them sufficient is not disclosed by the opinion.

Furthermore, there is no indication in the case that there was any person other than claimants who had a superior claim to the boat. All indications are that the claimants were also the owners, but could not say so for fear of incriminating themselves in the pending criminal prosecution. *1982 Sanger* is therefore not a case like this one where any presumption of a legal or equitable interest in the property that may be derived from the fact of possession was overcome by substantial evidence that a person other than the claimant was the true owner. As the Fifth Circuit said in the case below, however:

> Any presumption of ownership he enjoyed due to the fact that the Monstrance was seized from his possession was overcome by the clear meaning of the contract he and Uhart signed.

(Appendix 48a-49a.) *1982 Sanger* is therefore distinguishable from the case at bar and presents no clear conflict because (1) it was resolved at the pleading stage without any development of the facts and (2) there was no evidence that any person other than the claimants had a superior interest in the property.

United States v. One Hundred Twenty-Two Thousand Forty-Three Dollars ($122,043) in United States Currency, 792 F.2d 1470 (9th Cir. 1986) (hereinafter referred to as the *Meixner* case), is also distinguishable. In that case, the claimant, Cynthia Meixner, was arrested for currency

reporting violations as she attempted to board an airplane to Peru with $60,000 in unreported United States currency. When the Government filed a complaint alleging two counts of civil forfeiture as to the currency, Meixner contested the forfeiture on the grounds that the currency belonged to her husband, that she did not know that she was required to report currency that was not hers, and that the Government had therefore failed to prove an element of the offense, namely, her "knowing" violation of the reporting requirements. The district court granted the Government's motion for summary judgment on the ground that claimant was not the owner of the currency. However, the Ninth Circuit reversed because Meixner had demonstrated a possessory interest in the currency and under the circumstances separate proof of ownership was not required.

The *Meixner* case is distinguishable from this case on several grounds. First and most importantly, *Meixner* involves the forfeiture of currency. Where currency is involved possession is almost tantamount to ownership.

> . . . possession of money vests the title in the holder, as to third persons dealing with him, and receiving it in due course of business, and in good faith, upon a consideration good as between the parties. [Citations omitted.] This rule has grown up from the necessity of giving security and certainty to business transactions, for *money has no earmarks by which it may be distinguished, and its source of title cannot be traced as can that of a chattel or chose in action.*

Sutherland v. St. Lawrence County, 101 A.D. 299, 91 N.Y.S. 962, 965 (N.Y. App. Div. 1905) (emphasis added). Therefore, the federal courts have held that "[t]he seizure of property *from someone* is *prima facie* evidence

of that person's entitlement, particularly when the seized property is money — negotiable instruments difficult to identify and trace." *United States v. Wright,* 610 F.2d 930, 939 (D.C. Cir. 1979) (footnote omitted) (emphasis in original). This presumption that physical possession of currency is tantamount to its ownership generally prevails in the absence of any adverse claim. *See United States v. Palmer,* 565 F.2d 1063, 1065 (9th Cir. 1977) ("We conclude that in absence of any cognizable claim of ownership or right to possession adverse to that of appellant, the district court should have granted appellant's motion and returned to him the money taken from him by government seizure."). The *Meixner* case is therefore nothing but a specific application of a rule peculiarly applicable in currency cases. It does not demonstrate that the Ninth Circuit is at odds with the Fifth Circuit in cases involving chattels rather than currency where there is strong evidence, as there was in this case, of a superior claim to the same property.

Secondly, the Ninth Circuit in *Meixner* did not itself believe it was acting contrary to decisions in the Fifth Circuit. This is shown by the fact that the Ninth Circuit cited a Fifth Circuit currency case as consistent with its own ruling. *See United States v. One Hundred Twenty-Two Thousand Forty-Three dollars ($122,043) in United States Currency,* 792 F.2d 1470, 1473 n.5 (9th Cir. 1986), *citing United States v. $364,960 in United States Currency,* 661 F.2d 319, 326 (5th Cir. Unit B 1981). The Ninth Circuit is therefore not aware of any conflict with the Fifth Circuit as urged by Petitioner herein.

Finally, the Ninth Circuit has yet to confront a case like this one in which conferring standing on the basis of mere physical possession would have the effect of putting

the claimant in a better legal position *vis-a-vis* the Government than the true owner. Conferring standing on Cynthia Meixner had no such effect since she was the person perpetrating the offense. In this case, however, allowing Newton standing on no better ground then his physical possession of the Monstrance at the time of seizure would put him in a better legal position to contest the forfeiture under *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663 (1974), than Uhart, the true owner, since Uhart could not claim innocence with respect to the customs violation. Moreover, given the longstanding business relationship between Newton and Uhart and their prior communications about this case, there is every reason to believe that if Newton is allowed to contest the forfeiture and prevails, Uhart will share in the benefits of that success. Such an anomaly would significantly undermine the effective enforcement of the forfeiture statutes by creating a whole new category of "strawmen," namely, naked possessors. Yet, as the court stated in *United States v. One 1977 36 Foot Cigarette Ocean Racer,* 624 F. Supp. 290, 293 (S.D. Fla. 1985), "[t]he 'strawman' strategy helps mask the actual ownership. In addition, it makes it easier for the nominal owner to assert the 'innocent owner' defense in a forfeiture proceeding." [8] It is not at all clear that the Ninth Circuit would take a position on this issue contrary to the Fifth Circuit's ruling below. This Court would be ill advised to grant certiorari in

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[8] Newton's statement that the Government has an "alternative remedy" against Uhart, Newton Petition 16, makes no sense in the context of this case. Where, as in this case, the "true owner" against whom the Government has an "alternative remedy" is a fugitive from justice, the remedy is entirely empty. In short, the price for restoring Newton's mere right of possession is to deny the Government any relief at all.

anticipation of an alleged conflict among the circuits that may never arise. [9]

It is important to realize that the courts below did not ignore the effect of Newton's possession of the Monstrance at the time of seizure, but instead refused to give it a controlling significance in light of other evidence showing a superior claim in another party. "Even if Newton was initially entitled by virtue of his claim to possession of the Monstrance to be presumed its owner, *the Government fully rebutted that presumption.*" (Appendix 14a) (emphasis added). The ruling is fully consistent with the position taken by other circuits in similar cases. *See United States v. LaFatch,* 565 F.2d 81 (6th Cir. 1977), *cert. denied sub nom. LaFatch v. MM Corp.,* 435 U.S. 971 (1978); *United States v. Wright,* 610 F.2d 930, 939 and n.39 (D.C. Cir. 1979); *United States v. $11,580 in United States Currency,* 454 F. Supp. 376 (M.D. Fla. 1978). Accordingly, no conflict presently exists among the circuits that necessitates intervention by this Court. Any differences that do exist can probably best be worked out by the circuit courts themselves.

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[9] The cases Newton cites from other circuits are equally inappropriate. *See United States v. Five Hundred Thousand Dollars,* 730 F.2d 1437, 1439 (11th Cir. 1984); *United States v. $3,799.00 in United States Currency,* 684 F.2d 674, 678 (10th Cir. 1982). Not only do these cases also involve the forfeiture of currency, but the claimants in both cases were *denied* standing to contest the forfeiture. The cases are therefore no support for Newton's position and certainly do not conflict with the holdings of the courts below.

C. Even if the standing issue might have been decided differently in another circuit, the ruling below was correct because the courts will not entertain the claims of a fugitive from justice or one who derives his claim therefrom.

Even if the standing issue might have been differently decided in another circuit, it would not change the result in this case since the courts below could have properly refused to hear Newton's claim under this Court's decision in *Molinaro v. New Jersey*, 396 U.S. 365 (1970). In *Molinaro*, this Court dismissed an appeal by a criminal defendant who was a fugitive from justice at the time his case came before the Court. While the defendant's status as a fugitive did not strip his case of its character as a justiciable case or controversy, this Court held that it disentitled the defendant to "call upon the resources of the Court for determination of his claims." 396 U.S. at 366.

The *Molinaro* doctrine has been extended to civil proceedings generally, *see Conforte v. Commissioner*, 692 F.2d 587 (9th Cir. 1982), and specifically to civil forfeiture proceedings. *See United States v. $129,374 in United States Currency*, 769 F.2d 583 (9th Cir. 1985), *cert. denied sub nom. Geiger v. United States*, ____ U.S. ____, 88 L. Ed. 2d 901, 106 S. Ct. 863 (1986); *United States v. $45,940 in United States Currency*, 739 F.2d 792 (2d Cir. 1984). *But see United States v. $83,320 in United States Currency*, 682 F.2d 573 (6th Cir. 1982). Furthermore, in *United States v. $129,374 in United States Currency*, *supra*, the Ninth Circuit applied the *Molinaro* doctrine to bar the claim of a conservator of the estate of a fugitive from justice. In that case, Gerald Geiger (Gerald), the brother of Lewis Geiger (Lewis), the convicted fugitive, attempted to chal-

lenge the Government's efforts to forfeit currency, motor vehicles and other paraphernalia used in connection with certain drug offenses. Gerald was not only the conservator of the convicted defendant's estate, but was also a cosurety on the bail bond which had been forfeited when the defendant failed to appear for a sentencing hearing. In denying the conservator the right to contest the forfeiture of property owned by Lewis, the Ninth Circuit held that:

> The conservator's claim is solely derivative of any claim or defense that Lewis may maintain. If the fugitive is deprived of presenting any claim or defense in this action as a result of his fugitive status, the conservator of his estate must suffer the same consequences when he seeks to advance the same claim or defense.

769 F.2d at 587.

In this case, it is undisputed that Uhart, the owner of the Monstrance, is a fugitive from justice. (Newton Petition 3 n.1.) It is also undisputed that any and all of Newton's rights derive from his contracts with Uhart, that Uhart has the greatest amount at stake in these proceedings,[10] that Uhart has tried to keep the contract between him and Newton alive by voluntarily extending the contract period by "the exact number of days during which the Monstrance is withheld from you following its

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[10] Newton's contention that he has a greater financial stake in these proceedings than Uhart, Newton Petition 6 and n.3, mischaracterizes the issue. Since all parties agree that the Monstrance has been appraised at over $3 million, Newton Petition 6 and Appendix 5a, Uhart's financial stake in the outcome of this proceeding is $3 million, not the $110,000 he initially paid for the Monstrance, and is therefore much greater than Newton's.

seizure,"[11] that Newton has never sought the return of his security deposit,[12] and that the two men are in communication about these proceedings. Accordingly, if Uhart as the owner of the Monstrance would be denied the right to contest its forfeiture so long as he remained a fugitive, Newton, who is merely Uhart's agent or broker and who derives all of his rights from Uhart, should also be denied the right to contest the forfeiture. If this is correct, then the result in the court below would not be changed by the resolution of any alleged conflict among the circuits on the standing issue. In that event, it would not seem appropriate to issue a writ of certiorari in this case even if a conflict among the circuits on the issue of standing in forfeiture cases actually existed since this Court would be likely to decide this case on other grounds and the conflict would be irrelevant to the ultimate outcome of the case. *See* Stern, Gressman & Shapiro, *Supreme Court Practice*, § 4.4 at 201-02 (6th ed. 1986), *discussing Monrosa v. Carbon Black, Inc.*, 359 U.S. 180, 184 (1959) and *Sommerville v. United States*, 376 U.S. 909 (1964).

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[11] Uhart wrote Newton a letter in November of 1983 expressing his regrets for the difficulties caused by the seizure of the Monstrance. In that letter, Uhart stated, "I hereby formally extend the initial option period established in our Contract Agreement dated October 29, 1982, by the exact number of days during which the monstrance is withheld from you following its seizure." (Def. Ex. L; R. 93-96.)

[12] (R. 148-49.)

IV.

The Proceedings Resulting in the Forfeiture of the Monstrance to the United States Did Not Deprive Newton of Property Without Due Process.

Newton argues in his second point that the conduct of the forfeiture proceedings after his dismissal deprived him of due process. Specifically, Newton complains of the agreed judgment between the United States and the Republic of Colombia, the application of the "relation-back" doctrine by the district court, delay by the Government in instituting the proceedings, and the United States Attorney General's denial of Newton's petition for remission. Newton's claims are groundless, and, even grouped together, do not constitute a deprivation of property without due process.

The district court gave Newton the opportunity to present evidence supporting his allegations that he has a property interest in the Monstrance. The trial court considered the evidence, found that Newton lacked a legally sufficient property interest in the Monstrance to permit him to contest its forfeiture, and dismissed him from the action. The Fifth Circuit Court of Appeals affirmed the trial court's decision. As discussed above, the courts below properly denied Newton the right to contest the forfeiture. Because Newton had no right to participate in the forfeiture proceedings, he has no right to complain of the conduct of those proceedings.

One properly denied the right to participate in a proceeding does not have the rights of a party and has no right to appeal the merits of the underlying action, but only the order denying the right to participate. *United States v. South Bend Community School Corp.*, 710 F.2d 394 (7th Cir. 1983), *cert. denied sub nom. Brookins v.*

South Bend Community School Corp., 466 U.S. 926 (1984) (group whose intervention was properly denied had no standing to appeal merits of decision adopting consent decree); *Commonwealth of Pennsylvania v. Rizzo*, 530 F.2d 501 (3d Cir.), *cert. denied sub nom. Fire Officers Union v. Pennsylvania*, 426 U.S. 921 (1976); *Ramos Colon v. United States Attorney for D. Puerto Rico*, 576 F.2d 1, 6 n.10 (1st Cir. 1978) ("[A] party without a cognizable interest to proceed below is disqualified from prosecuting an appeal.").

Where a person making a claim to seized property is found to lack standing to contest the forfeiture, he may not appeal the entry of a default judgment, nor is he entitled to notice of the forfeiture proceedings, *United States v. Five Hundred Thousand Dollars*, 730 F.2d 1437 (11th Cir. 1984); *United States v. All That Tract & Parcel of Land*, 602 F. Supp. 307 (N.D. Ga. 1985); he may not challenge the constitutionality or construction of the statute under which forfeiture is sought, *United States v. One 1945 Douglas C-54 (DC-4) Aircraft, Serial Number 22186*, 604 F.2d 27 (8th Cir. 1979), *after remand*, 647 F.2d 864 (8th Cir. 1981), *cert. denied sub nom. Stumpff v. United States*, 454 U.S. 1143 (1982); he may not challenge the burden of proof requirement of 19 U.S.C. § 1615, the probable cause for issuance of a search warrant, or whether the statutory factual prerequisites for forfeiture have been met, *United States v. Fifteen Thousand Five Hundred Dollars ($15,500) in United States Currency*, 558 F.2d 1359 (9th Cir. 1977); he may not assert that his constitutional rights have been violated by delay in the forfeiture proceedings, *United States v. $11,580 in United States Currency*, 454 F. Supp. 376 (M.D. Fla. 1978); and he may not challenge the Government's assertion of probable cause for the forfeiture, *United States v. United States*

Currency Amounting to Sum of $30,800.00, 555 F. Supp. 280, 282-83 n.2 (E.D.N.Y. 1983), *aff'd,* 742 F.2d 1444 (2d Cir. 1983).

Having been properly excluded from participating in the forfeiture proceedings, Newton had "no constitutional rights in this matter that [he] may claim have been violated." *United States v. $11,580 in United States Currency,* 454 F. Supp. 376, 381 (M.D. Fla. 1978). His assertions of impropriety in the district court's entering judgment in accordance with an agreed order and in applying the "relation-back" doctrine of *United States v. Stowell,* 133 U.S. 1 (1890), as well as his assertions of delay, are therefore not properly before this Court.[13]

Additionally, the district court's decision did not depend in any way on an application of the *Stowell* doctrine. First, the district court expressly declined to apply *Stowell* in connection with its ruling on Newton's standing. (Appendix 44a.) Secondly, even on the merits, the application of *Stowell* (Appendix 37a) was not necessary to the district court's decision since no other claimant was before the court and default judgment was therefore appropriate. *See, e.g., United States v. Five Hundred Thousand Dollars,* 730 F.2d 1437 (11th Cir. 1984); *United States v. All That Tract & Parcel of Land,* 602 F. Supp. 307 (N.D. Ga. 1985); *United States v. One (1) 1980 49-foot Defender Yacht Lobster Vessel,* 566 F. Supp. 106 (S.D. Fla. 1983).

Newton also attacks the denial by the United States Attorney General of Newton's petition for remission. This

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[13] Furthermore, Newton's arguments relating to the *Stowell* doctrine and to delay in commencing the forfeiture action were not even raised in his Fifth Circuit appeal.

issue, like the *Stowell* issue, is not properly before this Court because Newton has never appealed the denial of his petition for remission. Moreover, the administrative consideration of a petition for remission "[does not] afford a claimant the full panoply of due process rights inherent in a judicial proceeding," *Ivers v. United States,* 581 F.2d 1362, 1371 (9th Cir. 1978), and the exercise of the Attorney General's discretion is not reviewable by the courts. *United States v. One 1972 Mercedes-Benz 250,* 545 F.2d 1233, 1236 (9th Cir. 1976); *United States v. United States Currency in the Amount of $2,857.00,* 754 F.2d 208 (7th Cir. 1985).

Newton was not deprived of due process by delay, by the district court's application of the *Stowell* doctrine, by the entry of judgment pursuant to an agreed order, or by the Attorney General's denial of his petition for remission. Because he was properly denied standing to participate in the forfeiture proceedings, he had no due process rights with respect to those proceedings.

CONCLUSION

This Court should not review this case. The circuit courts are not divided on the issue of standing in forfeiture cases. The proceedings resulting in the forfeiture of the Monstrance to the United States did not deprive Newton of property without due process. The Republic of Colombia respectfully requests that James Newton's Petition for Writ of Certiorari be denied.

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CERTIFICATE OF SERVICE

I, Robert E. Goodfriend, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Brief of Respondent Republic of Colombia in Opposition to Petition for Writ of Certiorari on counsel for Petitioner and counsel for the United States Government, by depositing same in the United States mails, postage prepaid, on this 23rd day of March, 1987, addressed to:

MR. JAMES LUKIN DROUGHT
MS. PATRICIA J. SCHOFIELD
Brite, Drought, Bobbitt & Halter
2400 InterFirst Plaza
San Antonio, Texas 78205

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530

By _____
Robert E. Goodfriend, P.C.

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1986

JAMES W. NEWTON,
Petitioner,

THE UNITED STATES
OF AMERICA, et. al.
Respondents

No. 86-1232

AFFIDAVIT OF FILING BY MAIL

I, ROBERT E. GOODFRIEND, a member of the Bar of the Supreme Court of the United States, being first duly sworn on my oath, depose and state as follows:

I received a copy of James Newton's Petition for Writ of Certiorari on January 22, 1987. To my knowledge, the Brief of Respondent Republic of Colombia in Opposition to Petition for Writ of Certiorari was placed in a sealed envelope, with first-class postage prepaid, and properly addressed to the clerk of the Supreme Court of the United States, and deposited in a United States post office on March 23, 1987, which time is within the time allowed for filing, pursuant to an extension of time granted by letter from Francis J. Lorson dated February 18, 1987.

Robert E. Goodfriend

STATE OF TEXAS }
COUNTY OF DALLAS }

Subscribed and sworn to before me this 23rd day of March, 1987, to certify which witness my hand and seal.

Notary Public in and
for Said County and State

SELECTED RECORD EXCERPTS AND TRIAL EXHIBITS

(THE FOLLOWING RECORD EXCERPTS AND EXHIBITS ARE TAKEN FROM THE PROCEEDINGS IN THE TRIAL COURT DATED SEPTEMBER 6 AND 9, 1985.)

SELECTED RECORD EXCERPTS FROM HEARING BEFORE THE HONORABLE H. F. "HIPPO" GARCIA

September 6, 1985

[16]

Q Other than traffic citations, have you had any criminal charges filed against you?

A No, sir.

Q I want to talk to you for a moment about your association or knowledge of a gentleman by the name of Edwardo Uhart.

You know him, do you not?

A I do.

Q For how many years up to today have you known Mr. Edwardo Uhart?

A It's been approximately nine years, I would say, since 1975 or 1976 when I first heard of the man.

Q All right.

When did you meet him for the first time?

A I met him after he telephoned me from New York that he was coming through Texas and that he did indeed have a painting that I was interested in. He would like to come to my office and meet me.

Q Do you recall approximately what year that was, Mr. Newton?

A I believe that was 1976.

Q All right, sir.

Now, describe, if you would, this initial transaction that you had with Mr. Uhart in connection with this painting?

A Yes, sir; I had been interested in a medieval painting that had been offered for sale at Sotheby's in London for which I had a catelogue. I had bidded — underbid on the piece, and

[17]

I had lost the sale, and I wrote to a Mr. Smith who was then director — excuse me. I called Mr. Smith who was then the director of Sotheby's and requested that if he could contact the successful purchaser that I would appreciate being put in contact with the man.

Q All right.

And was it through that that you were put in contact with Mr. Uhart, the successful purchaser?

A Yes, sir; when he called, he stated that he had received my letter which was nearly a year later, but the letter had caught up with him at his Barcelona gallery. And he stated that he had — that he still had the painting and that he would consider negotiations.

Q And did you ultimately buy that painting from him?

A Yes, sir; I did.

Q And was that transaction with Mr. Uhart handled informally or did you have attorneys draw up purchase documents or agreements?

A There were no purchase documents or agreements. It was — I would say informally, yes.

Q Sotheby's is one of the world's most prominent art galleries?

A Yes, sir; I would say they are.

Q Did they impart to you any derogatory information about Mr. Uhart when you contacted them?

A No, they did not.

[18]

Q All right.

Now, did you come to learn at or near that time what Mr. Uhart did? What his business or profession was?

A Yes, sir; he explained to me that he had a gallery in Barcelona.

Q He — he owned what, an art gallery?

A It was an art gallery of primitive art.

Q In Barcelona, Spain?

A In Barcelona, Spain, yes.

Q And do you have an idea, Mr. Newton, how long Mr. Uhart had owned an art gallery in Barcelona, Spain?

A I have seen photographs of the gallery and it was very impressive. I have no idea when he first opened it.

Q All right.

Did you come to meet Mr. Uhart's partner in the Barcelona, Spain art gallery?

A Yes, sir. Some years later he did travel through San Antonio and he did contact me.

Q All right.

And was his partner a director of the museum in Spain?

A Yes. He was a former director of the museum in Barcelona, Spain.

Q And was it a prominent museum?

A Yes, sir; it was.

Q You had lived there for some time, had you not?

[19]

A I had studied there, yes, sir.

Q And you were familiar with the museum?

A I was.

Q Did Mr. Uhart travel quite a bit, Mr. Newton, at that time?

A Yes, sir.

Q What else did he do?

A Well, he was constantly following the art market. He was following the galleries. He did travel and he did maintain an apartment in Paris which was one of his addresses on his letterhead. And he did pursue the market. He went to London consistently for the auctions that were scheduled in England.

Q Was he in the business of buying art pieces if he found them and imported them or exported them?

A Yes, sir; I would say he was.

Q All right.

Now, had you an occasion during — prior to 1981, to do any other business with Mr. Uhart other than the one painting that you mentioned?

A Yes, sir. There was various trades and exchanges, I would say. I saw some of his pieces. He particularly liked a few small objects that I had in my home, and there were other trades.

Q All right.

About how many pieces would you estimate, Mr. Newton, that you had prior business dealings with Mr. Uhart on?

[20]

A Oh, I would say under ten, possibly nine pieces — seven pieces were exchanged.

Q All right.

For a monetary value of approximately how much money?

A Well, that would be difficult to say because most of these pieces were pieces of Spanish, French, European origin, and they were antique pieces. And since they were — they were exchanges, they were trades between the two of us. It would be difficult to say the exact monetary value. I would say it was approximately — probably, if they were actually put on the market for auction, it would be under twenty-five or $30,000.

Q All right, sir.

In connection with the painting that you purchased from him, what was the name of the painting?

A Well, it wasn't named. It was anonymous painting that was done approximately about 1480, late 15th century. It was a printish painting and the subject was the crown of thorns. It was from the school of Hieronymus

Bosch which was a celebrated painter in Spain. He was actually Flemish, but he was in major collection and it was very reminiscent of his style. There was — paintings from that age generally are not known or signed. It is only of a type of school he had been associated.

Q Well, in connection with that transaction with Mr. Uhart, did you find the painting that you bought from him to be authentic?

[21]

A Yes, sir; I was satisfied. Completely satisfied. It had been in Sotheby's and it was authenticated to be a 15th century painting.

Q All right, sir.

Did you find it to be a valuable painting?

A It was valuable to me because it was an area that I was particularly interested in — the period of time which I am interested in.

Q Well, my point is, was there any difficulty associated with that prior transaction with Mr. Uhart concerning that painting that would cause you to be suspicious of him or think he was a shady character or anything of that nature in connection with the way he did business with you?

A None whatsoever.

Q Did he keep his word to you in price and quality of objects that you traded with him?

A Very definitely.

Q During the period, say, of 1979 or so to 1982, how many times a year would you see Mr. Uhart in person?

A Well, that would depend. He generally would call if he was coming through Texas. He was always interested in the museums and culture here if he were travelling from New York to California or going from New York to Mexico or South America — if he was coming through San Antonio, he would generally notify me in advance and tell me approximately he would be here.

* * *

[25]

stipulate to that. It arrived at JFK Airport on that date.

MR. WHEATLEY: We will prove that up later, your Honor.

Now, having seen it come into this country, Mr. Newton, on February 24, 1981, with that date in mind, I want you to try to fix a point roughly when you first heard of the monstrance prior to its date of import — approximate time period?

A Well, it was probably six months to a year earlier that Mr. Uhart called me.

Q All right.

And what did he say to you?

A Well, he described the piece as a religious art which was made of gold and encrusted with some 1500 jewels that was to be, I believe he said, made available on the market. And he wanted to know if I would be interested.

Q All right.

Did he relate anything more substantial to you to describe the piece at that time?

A Not really, other than it was a piece of the eighteenth century and was Spanish Colonial.

Q Do you recall what words he used to describe it, Mr. Newton, the monstrance, chalice, or —

A — Yes, sir; he called it in the Spanish term of custodia which is the term used or which is the same term as monstrance in French which describes the piece as holder of the host.

* * *

[29]

of this monstrance into the United States?

A No, I did not.

Q Did you hear from Mr. Uhart again concerning this monstrance prior to the time that it was imported into this country?

A I'm sorry.

Q Did you hear — let me rephrase that: Did you hear from Uhart again concerning this monstrance until after it was already imported into this country?

A No, sir; I did not.

Q All right.

And if we all agree that February 24 was the date in 1981 when it came in, tell the Judge, if you would, following that date, when was the next time you heard from Mr. Uhart about this piece?

A Yes, sir. Mr. Uhart called me probably within a month after the piece had been brought into this country. He reminded me by telephone that he referred to the

earlier call and referred to the piece that he had mentioned approximately a year earlier and stated that he had since purchased the piece. And he had imported it into the country, and he felt that because of the glamour and history of the piece that I should really reconsider and have a look at it.

Q. All right.

And was this a personal visit with Mr. Uhart or telephone

* * *

[78]

to Mr. Uhart to a New York bank — to a sister bank with certain additional documents that required signing.

Q Did Liberty Frost Bank use Chase Manhattan Bank in New York for that purpose?

A Yes, sir; they did.

Q I now hand you what has been marked as Defendant's Exhibit I and ask you if these are the documents in fact which Liberty Frost wrote to Chase Manhattan Bank in an effort to transmit the funds to Mr. Uhart?

A Yes, sir; these are the documents that accompanied payment.

Q Now, what Liberty Frost sent to Chase Manhattan — well, excuse me, your Honor. First of all, I move into evidence Defendant's Exhibit I consisting, for the record, of six pages.

MS. MATHY: Your Honor, may I ask the witness about these documents?

THE COURT: Yes, ma'am.

MS. MATHY: Mr. Newton, did you receive a copy of this December 1982 letter by Michael Dippo that was written?

A No.

MS. MATHY: Did you obtain this packet of documents from the bank files?

MR. NEWTON: No.

MS. MATHY: How did you come in possession of this December 1982 letter?

MR. NEWTON: Well, I was leaving for Montana at that

[79]

time to spend Christmas with my family, and this transaction was left as a normal banking transaction with Liberty Frost Bank. These were copies that they had and made, and when they consummated the transaction, they gave me the letters upon my return. They gave me the entire dossier, I should say.

MS. MATHY: Your Honor, the United States has no objections to the admissions of these exhibit into evidence. Although this was not produced earlier by a subpoena.

MR. TAYLOR: No objections, your Honor.

THE COURT: Will be received into evidence.

(Defendant's Exhibit I admitted)

MR. WHEATLEY: Now, let's discuss briefly these documents, Mr. Newton. Let me give you a copy to — may I borrow back one of those copies, please?

The Liberty Frost, Mr. Michael Dippo, vice-president, sent to Chase a certificate — a list of documents to be signed by Uhart, is that correct?

A That's correct.

Q Including a certificate of ownership and look through here as we go with the Court and look at the next to the last page. Is that called certificate of ownership?

A Yes, sir.

Q Evidencing that Uhart was in fact the owner and there was no claim against the monstrance at that time, is that correct?

A That's correct.

[80]

Q Number two, acknowledgement regarding deposit. Do you see the second document in that package called acknowledgement, is that the document?

A Yes, sir.

Q And, then, thirdly, there is a contract agreement extension. Do you see that document in the packet?

A Right.

Q And, then, as I read this letter, there was to be endorsed a $65,000 check to James W. Newton upon when Mr. Uhart receives a check for $135,000, do you see that in the letter?

A Yes, sir.

Q Now, that totals $200,000, is that correct?

A That's correct.

Q What was the $65,000 item, Mr. Newton, if you would be kind enough to explain that?

A Yes, sir. The $65,000 consisted of debt that was owed to me previously by Edward Uhart in which he agreed to pay for or he agreed to pay at the time he received cash in this country.

Q Okay.

Was it for art objects or other items that you had bought or sold or traded with him?

A The largest portion of this, $50,000, was return for payment of a painting that had never been released by a family.

Q All right.

Now, what was the other 15,000 for?

[81]

A The other 15,000 consisted of various items — the difference of various items that had been traded back and forth between the two of us and which he agreed upon the additional amount that was still outstanding on his account.

Q Was this transaction, then, used to clear at that time some of these transactions with Mr. Uhart?

A Yes, sir; it was used to clear all of them.

Q All right.

Now, on the last page of this exhibit, Mr. Newton, there are two cashier's checks, do you see those?

A Yes, sir.

Q From Mercantile Bank to Edward Uhart.

A Right.

Q One is for $135,000 and another is for $65,000, is that correct?

A Yes, sir.

Q And how was Mr. Uhart to return to you the cashier's check for $65,000 so that you all would be square on your account?

A He was to sign for the checks at the Chase Manhattan and per instructions, he was to return the check to New York — the Chase Manhattan was to return the check to me through my bank. That is, they were to sent this check back to Liberty Frost where they would deposit it in my account.

Q Okay. Very good.

* * *

[93]

MR. TAYLOR: Your Honor, this letter —

MR. WHEATLEY: They may contend they are surprised by the contents of it, but —

MR. TAYLOR: This letter is dated November 25, 1983, and it is before the seizure took place. The letter is not between client and his lawyer. It is a letter from Mr. Uhart to Mr. Newton.

MR. WHEATLEY: It is after the seizure, Counsel.

MR. TAYLOR: After the seizure. Okay, I take it back. Before the lawsuit but after the seizure, and I think it violates the discovery rule and we object to it on that basis.

THE COURT: Well, I am going to overrule the objection and let it in.

(Defendant's Exhibit L admitted)

MR. WHEATLEY: Now, let's look at this letter for a moment, Mr. Newton. I want to — "Dear Jim. I wish to express to you my sincerest regrets for the difficulties which you have been caused these past months about the Great Monstrance of the Santa Clara Convent of Tunja. These troubles should not have occurred at all because there was nothing wrong about the monstrance when we made our contracts, and there is nothing wrong about it now.

"All of the trouble about the monstrance, I believe, can be laid at the feet of a U.S. Customs official in New York, Mr. Charles Koczka. Based on what has happened to me, I am sure

that he has no regard for the rights of others. I believe that in the case of the monstrance he has resorted even to going outside the law to bring pressure to bear illegally on myself, persons near me, and even including the presidency of Colombia.

"As I have always told you, I bought the monstrance in Colombia in 1981. I did so with assurance that the sale was legal. I even obtained from the convent a document signed by the Abbess, reflecting that the sale had been

approved by the Colombian government as well as the Catholic Church. This is the document which I delivered to you with the monstrance.

"You should also know that it is true as declared in the Colombian press by Monsignor Trujillo Arango, that the monstrance was sold to me because there was no money in the convent, but there was no one in Colombia, even the government, who would offer the price that I paid.

"When I brought the monstrance into the U.S.A. immediately after my purchase, I turned over the entire matter of Customs to the broker. I am sure that he did nothing intentionally wrong even if someone in his office later made the clerical error of saying, 'Bogota, Spain'; an error which I thought was completely cleared up back in 1981.

"Even though I did nothing wrong, I have my responsibility to you as my customer to make sure that the burden on you is minimized. You, who received the monstrance in good faith and

[95]

made your option payment in full compliance with our contracts, should not suffer.

"To alleviate somewhat the inconvenience which this trouble has caused to you, I hereby formally extend the initial option period established in our contract agreement dated October 29, 1982, by the exact number of days during which the monstrance is withheld from you following its seizure. In other words, instead of your obligation being to make the second confidence deposit on December 16, 1983, one year from the date of the initial deposit, the due date for that confidence deposit payment is

postponed by the number of days from the date of the seizure on January 20, 1983, to the date on which the monstrance is returned to you by the U.S. Government. This extension is made without effect on your rights established by our agreements."

And is that Mr. Edward Uhart's signature on that paper?

A Yes, sir.

Q All right.

THE COURT: Mr. Wheatley, aside from that last paragraph, there is nothing that has to do with Mr. Newton — with Mr. Newton's standing.

MR. WHEATLEY: It does to this extent. If the Government was going to contend that Mr. Newton was somehow not a good faith purchaser which they said in their briefs, or that somehow he was negligent, if they are going to contend that,

[96]

this letter is relevant to that. But, at this time, your Honor, until they contend that, I am more willing to not to offer it — any portion of this letter except the last two paragraphs.

THE COURT: That will be received into evidence. Let's go.

(Defendant's Exhibit L admitted)

MR. WHEATLEY: Now, Mr. Newton, as we have seen about two months after you have made this agreement with Mr. Uhart, the monstrance was seized by U.S. United States Customs, was it not?

A Yes, sir; it was.

Q Was it seized while it was in your possession at the San Antonio Museum?

A Yes, it was.

Q And was it seized at gun point by Customs officials?

A Finally, yes, it was.

Q Were there two agents there that held a gun on you and Mr. Steve Cristel (phonetic) who was there with you?

A There were two agents who were there. I don't know who the additional personnel was who came in with the others. There were three other individuals, to my recollection.

Q And did the United States Customs agent at that time take and remove from you from your person certain documents that you had in your possession?

A Yes, sir; the entire packet of documentation that I carried with the monstrance.

* * *

[104]

THE COURT: You may proceed, Mr. Wheatley.

MR. WHEATLEY: Thank you, your Honor. At this time we will rest our testimony of Mr. Newton.

THE COURT: All right. You may cross examine, Ms. Mathy.

MS. MATHY: Yes, your Honor.

CROSS EXAMINATION

BY MS. MATHY:

Q Mr. Newton, this morning I believe you testified that you have known Mr. Uhart about nine years, is that right?

A That's correct.

Q Now, I know from Exhibit L that you received correspondence from Mr. Uhart since the time it was seized by Customs. Have you spoken with him on the telephone since the time of seizure?

A Yes.

Q And approximately how many times?

A I really don't remember.

Q Can you give us —

A It has been infrequent.

Q Infrequently. So, that means less than five?

A I really can't remember. It's been three years. It has not been very often and he has called from various points when there has been a conversation.

Q It has not been three years since the seizure, Mr. Newton.

Have you telephoned Mr. Uhart or has Mr. Uhart telephoned

you?

A As I said, he has always called me. I did not know where Mr. Uhart is.

Q Have you talked with Mr. Uhart in the last year?

A Yes, I have.

Q Then Mr. Uhart has telephoned you within the last year?

A Yes, ma'am.

Q Have you talked about his indictment in the Western District of Texas?

A No, I have not.

Q Does Mr. Uhart know that he has been indicted?

A I assume he does.

Q But you don't know for a fact that he knows?

A No, I never have discussed it with him.

Q Have you discussed whether or not he was going to come back and file a claim and contest this forfeiture?

A No.

Q Have you ever asked him if he was coming back or come back and contest this forfeiture?

A No, I haven't, Ms. Mathy.

Q You haven't perhaps asked him to come back and file a claim to support your claim?

A No.

Q Is Mr. Uhart if you — is he under the impression that you are going to represent Mr. Uhart in his interest with respect

to this forfeiture action?

A No.

Q So, exactly what did you talk — you didn't talk with him about his indictment and that is something of note. You didn't talk about him coming back to file a claim — what are you talking about with Mr. Uhart on the phone?

A Well, primarily, he has called and asked if there had been any significant advances towards the return of the monstrance and since nothing has happened, and we have not gotten into Court, I really had nothing to tell him.

Q Now, you knew that Mr. Uhart had been indicted, right?

A Yes, I did.

Q Do you know that Mr. Uhart is a fugitive from justice?

A Yes, I do.

Q Have you reported any of your contacts with Mr. Uhart to any law enforcement authority of the United States?

A To a law enforcement authority?

Q Yes. Have you reported those telephone calls to the United States Customs Service?

A No, I haven't.

Q Have you reported any of those phone calls to the United States Marshal?

A No.

Q Have you reported any of those phone calls to any other law enforcement agency of the United States?

* * *

[148]

Line fourteen. Question: "Do you have any recollection about the approximate value of the monstrance might have been at the time you entered into those agreements on the loan of $200,000 to Mr. Newton?"

Answer: "You mean the value as far as art piece or the values as far as a broken down values?"

Question: "Either one. Any kind of value at all and then you tell me how you value — which value you are talking about?"

Answer: "When an art piece is valued is whenever someone will pay for it. Consensus at that time, I believe, was in excess of a million as an art piece. As a melted down piece, I want to say $250,000."

Question: "What was the basis of your approximation of the melt-down or the salvage price?"

Answer: "I believe Bud — "

Q Are you referring to Mr. McGrath?

A I think so.

Answer: "I believe Bud got that from some jeweler here in town."

A They had both seen this letter, Ms. Mathy.

Q Again, for the record, the questioning in that transcript was by Mr. Taylor.

Now, Mr. Newton, am I correct that you haven't demanded the return of the $200,000 from Mr. Uhart, is that right?

[149]

A You are correct.

Q And you haven't demanded of him, am I also correct, or am I wrong? You haven't demanded the return of the $200,000 from Mr. Uhart because this Exhibit L, this letter to you from Mr. Uhart dated November 25, 1983 that we learned about this afternoon? Is that the reason why because of what Mr. Uhart told you in that letter?

A No, that is not the reason why.

Q Well, the way I read and maybe you should get it in from of you, Mr. Newton — this is Exhibit L. The way I read the last paragraph on page two, and I will wait until you have located it before I ask you the question.

A All right.

Q When I read this last paragraph, is that Mr. Uhart is extending the initial option period, quote, "initial option period," unquote, i.e., in quote, "contract agreement dated October 29, 1982", end quote. So that in effect, you don't have to put up any additional monies on the contract extension agreement or make any kind of a demand at all because he is kind of frozen things there for you — is this what this is about?

A He has extended the period of time for the amount of number of days that it has been detained by U.S. Customs, that is correct.

Q No further questions, your Honor.

* * *

[165]

Q This Exhibit J which includes your contract, this was the document that you presented to your guarantors, was it not, to show ownership?

A No. sir. That is one I had drawn up because of their suggestion or agreement that we would have one drawn up.

Q What I am saying, there, the only written document that you had in your possession that talks about ownership of the monstrance, is a certificate that shows Uhart is the owner.

A In shows that he was the owner at the time of sale to me, yes.

Q Are there any other written documents you have that states that you are the owner?

A Yes, sir.

Q Would you show them to me, please?

A The contract of sale which states that there is $200,000 that I put up for purchase.

Q That's purchase — is there anything in there —

A Two hundred thousand dollars was put down for purchase, yes. That is purchase. I would consider that ownership.

Q All right.

That was the deposit for the purchase, right?

A It was a down payment — deposit.

Q That's enough. Just one more question.

Is there any document that you have that states that you are the owner?

[166]

A None other than the contract of sale.

Q So the only document that you have that shows or indicates ownership is the certificate that Mr. Uhart signed, is that correct?

A If you are referring to the contract; yes, sir, that is correct.

Q I am referring to the fact that the only document that states who the owner of the monstrance is — who the owner of the monstrance is, is a certificate signed by Edwardo Uhart and was prepared by you, is that a correct statement?

A (Pause) I don't have but only the contract of sale, Mr. Taylor, which I put down $200,000. I do not have a bill of sale from him. I have not completed payment on the piece, as you know. If you are asking if I have a release or bill of sale or that this contract has been paid in full, no, I do not have one.

Q Are you making a claim here on behalf of Edwardo Uhart?

A For what?

Q For the monstrance.

MR. WHEATLEY: Asked and answered about thirty minutes ago.

MR. TAYLOR: I don't recall his answer.

MR. NEWTON: No, I don't represent Mr. Uhart.

Q I will pass the witness.

MR. WHEATLEY: May we confer for just a moment, your

SELECTED RECORD EXCERPTS FROM
HEARING BEFORE THE
HONORABLE H.F. "HIPPO" GARCIA

September 9, 1985

[43]

questions.

Number one, Claimant James Newton has filed a motion to stay this trial pending his appeal to the Fifth Circuit. The United States has to be in opposition of that request for stay and is ready and willing to proceed with the trial of this matter.

The second thing I would like to address in the status call is that in an attempt to streamline the proof at the hearing, I have approached Counsel for the Republic of Colombia in an effort to enter into stipulations so that this hearing might go forward on stipulated evidence. The Republic of Colombia is agreeable in doing so. As this Court knows, there's been extensive pre-trial discovery in the matter and what we might do is incorporate portions of depositions that have already been taken in this case.

I am now going to defer to Counsel for the Republic of Colombia whom I know has a statement which he wishes to make to you.

MR. TAYLOR: Your Honor, before I proceed, I would like to introduce Mr. Bill McCue from the firm of Burke

and Burke from New York City who is co-Counsel for the Republic of Colombia.

As the Court knows, in the prior hearing on the motion to dismiss Mr. Newton's claim for lack of standing, the Court has dismissed Mr. Newton's claim. At this point, the claim of

[44]

the Republic of Colombia is really been mute. Because under the terms and conditions of the agreement between the United States of America and the Republic of Colombia, the United States of America has agreed to remit the monstrance to the Republic of Colombia. The Republic of Colombia hereby requests the Court to allow it to conditionally withdraw its claim based on the following agreements and conditions.

One, that U.S.A. has agreed to remit the monstrance to the Republic of Colombia in the event it is forfeited. This agreement renders the claim of the Republic of Colombia mute. In consideration of the United States of America has agreed to remit the monstrance to the Republic of Colombia, the Republic of Colombia agrees that U.S.A. should not be required to remit the monstrance until the final disposition of all claims.

They further agree, that is that the Republic of Colombia has agreed to allow the monstrance to be displayed in the San Antonio Museum of Art for a period of at least three months on terms and conditions to be negotiated between the Republic of Colombia and the San Antonio Museum of Art.

The Claimant James Newton has expressed an intention to appeal the dismissal of his claim and the forfei-

ture. In the event that judgment of the forfeiture is reversed and remanded, the Republic of Colombia again requests the Court to permit it to reassert its claim without prejudice. The Republic of Colombia will conventionally withdraw its claim only if the

[45]

written judgment of forfeiture expressly provides that, A, the claim is withdrawn without prejudice, notwithstanding any limitation period.

B, that the claim will be automatically reinstated without prejudice in the event the cause is remanded.

Or, if U.S.A. fails to remit as previously agreed to.

And we are asking the Court to provide in the forfeiture order that we are withdrawing our claim and that U.S.A. has agreed to remit it to us. But in the event that the cause is remanded, we urge that our claim be reinstated and be able to proceed and be able to reassert it. We would so like the Court to provide it in its order.

THE COURT: All right, Mrs. Mathy.

MRS. MATHY: Yes, your Honor.

THE COURT: Lady and gentlemen, we will set it for the 23rd at nine-thirty.

MRS. MATHY: Yes, sir.

THE COURT: And we will pass on the motion at that time.

MS. MATHY: Thank you, your Honor.

THE COURT: The 23rd at nine-thirty.

What does it take to get the thing over here? I want to look at it. (Laughter)

MS. MATHY: I will see if I can get it in Court on the 23rd, your Honor.

SELECTED DEFENDANT'S EXHIBITS FROM HEARING BEFORE THE HONORABLE H. F. "HIPPO" GARCIA

September 6, 1985

DEFENDANT'S
EXHIBIT
A
SA-83-CA-1681

Liberty Frost Bank

December 9, 1982

Chase Manhatten Bank
1 Chase Manhattan Plaza
New York, N.Y. 10081

Attention: Collection Department

Dear Sir,

Please follow the below instructions on what needs to be signed by Mr. Eduard Uhart:

1. Certificate of Ownership.
2. Acknowledgement regarding deposit.
3. Contract extension
4. Endorse $65,000 check to James W. Newton upon which Mr. Uhart receives check for $135,000.

After all documents and check have been signed, please return them to Liberty Frost Bank, P. O. Box 32788, San Antonio, Texas 78284 to the attention of Michael A. Dippo.

If you have any questions regarding these instructions, please contact me.

Regards,

Michael A. Dippo
Vice President

MAD/bh

DEFENDANT'S EXHIBIT I 9-6-85 SA-83-CA-268I

Liberty Frost Bank, National Association 11900 Blanco Road Post Office Box 32788 San Antonio, Texas 78284 512/349-2881

ACKNOWLEDGEMENT

DATED: December , 1982

RE: Contract Agreement by and between Eduard Uhart and James W. Newton Associates, dated October 29, 1982.

Execution of this instrument will serve as acknowledgement of receipt of the funds referred to in the captioned agreement as "Confidence Deposit" in the amount of $200,000.

It is further acknowledged and agreed that any rights of James W. Newton Associates under the captioned agreement are transferable and are specifically assignable to a commercial bank for the purpose of obtaining the aforementioned deposit funds.

This will serve as an addendum to the captioned contract and become a part thereof for all purposes.

Receipt of the $200,000. deposit:

_____ Date: _____
Eduard Uhart

Witness: _____

James W. Newton remittes $$ deposit

CONTRACT AGREEMENT EXTENSION

RE: CONTRACT DATED OCTOBER 29, 1982, BY AND BETWEEN EDUARD UHART AND JAMES W. NEWTON ASSOCIATES, AS AMENDED, WITH REFERENCE TO THE GREAT MONSTRANCE OF SANTA CLARA BY NICOLAS DE BURGOS.

THIS EXTENSION AGREEMENT IS BETWEEN JAMES W. NEWTON ASSOCIATES AND EDUARD UHART, REGARDING EXCLUSIVE RIGHT TO SELL OR PLACE THE GOLD MONSTRANCE OF SANTA CLARA.

THIS AGREEMENT IS MADE REGARDING THE RIGHT TO AN EXTENSION OF AN ADDITIONAL YEAR TO CONSUMMATE SALE PLACEMENT OF SAID MONSTRANCE.

SHOULD A ONE-YEAR TIME EXTENSION BE REQUIRED FROM MR. UHART, IT IS AGREED THAT JAMES W. NEWTON ASSOCIATES PROVIDE THE FOLLOWING:

AN ADDITIONAL CONFIDENCE DEPOSIT OF $150,000.00 PAYABLE TO EDUARD UHART IN EXCHANGE FOR AN ADDITIONAL ONE YEAR.

ALL TERMS OF ORIGINAL CONTRACT REMAIN IN FULL FORCE AND EFFECT BETWEEN JAMES W. NEWTON ASSOCIATES AND EDUARD UHART. WHEN SALE IS CONSUMMATED IT IS AGREED THAT JAMES W. NEWTON ASSOCIATES WILL RECEIVE TWENTY PERCENT OF SALE PRICE, OR $200,000.00 WITH THE BALANCE BEING PAID TO EDUARD UHART IN THE AMOUNT OF $800,000.00

SHOULD SALE OF MONSTRANCE NOT BE COMPLETE WITHIN PERIOD OF EXTENSION CONTRACT, MR. UHART WILL HAVE A PERIOD OF TIME NOT TO EXCEED SIXTY (1) DAYS BEYOND THE EXPIRATION OF THE ONE-YEAR EXTENSION GRANTED BY THIS AGREEMENT IN WHICH TO RETURN THE DEPOSIT MONIES IN EXCHANGE FOR THE RETURN OF THE GOLD MONSTRANCE. IF THE DEPOSIT MONIES ARE NOT RETURNED WITHIN THE TIME PROVIDED, THEN THE MONSTRANCE WILL BECOME THE PROPERTY OF JAMES W. NEWTON AND ASSOCIATES.

DATED: _____

_____
EDUARD UHART

_____
JAMES. W. NEWTON

CERTIFICATE

I, EDUARD UHART, CERTIFY THAT I AM THE LEGAL OWNER OF THE GOLD AND JEWELED MONSTRANCE OF SANTA CLARA, TUNGA, COLOMBIA, MADE BY NICOLAS DE BURGOS.

I FURTHER CERTIFY THAT I AM THE SOLE OWNER OF THIS MONSTRANCE, AND THAT THERE ARE NO CLAIMS OR ENCUMBRANCES AGAINST THIS PIECE. I AGREE TO PERSONALLY INDEMNIFY A PURCHASER AGAINST ANY CLAIMS THAT SHOULD ARISE, OR SHOULD THIS STATEMENT NOT BE TRUE AND CORRECT.

SIGNED

EDUARD UHART

BEST AVA

MERCANTILE BANK

Loop 410 at McCullough
P.O. Box 32267
San Antonio, Texas 78284
(512) 340-5000

Cashiers Check

30-83
1140

№ 206167

Date December 8, 1982 DEC 8 82

Pay To
The Order Of Eduard Uhart

$135,000.00

MERCANTILE I35,000 00 CTS

An indemnity bond will be required before any official check of this bank will be replaced or refunded, in the event it is lost, misplaced, or stolen.

Purchaser James W. Newton Loan Proceeds

Vice Preside
Assistant Cashi

⑈206167⑈ ⑆114000831⑆ 21 088 9⑈

MERCANTILE BANK

Loop 410 at McCullough
P.O. Box 32267
San Antonio, Texas 78284
(512) 340-5000

Cashiers Chec

30-83
1140

№ 2061

Date DEC 8 82

Pay To
The Order Of Eduard Uhart

$65,000.00

MERCANTILE 65,000 00 CTS

An indemnity bond will be required before any official check of this bank will be replaced or refunded, in the event it is lost, misplaced, or stolen.

Purchaser James W. Newton, Loan Proceeds

Vice Presi
Assistant Cash

⑈206168⑈ ⑆114000831⑆ 21 088 9⑈

MR. LUSK'S SECTY.
DIANNA JACKSON
MERCANTILE BANK
SAN ANTONIO

37r

AILABLE COPY

Eduardo Uhart A.

Ave. Santa Maria 1790
Dep. 182 - Tel. 461863
Santiago- Chile

26 BLV - Raspail
Paris 7- Tel. 2225672
France

November 25, 1983

Mr. James W. Newton
7731 Broadway #8
San Antonio, Texas 78209
U. S. A.

Dear Jim:

I wish to express to you my sincerest regrets for the difficulties which you have been caused these past months about the Great Monstrance of the Santa Clara Convent of Tunja. These troubles should not have occurred at all because there was nothing wrong about the monstrance when we made our contracts and there is nothing wrong about it now.

All of the trouble about the monstrance, I believe, can be laid at the feet of a U.S. Customs official in New York, Mr. Charles Koczka. Based on what has happened to me, I am sure that he has no regard for the rights of others. I believe that in the case of the monstrance he has resorted even to going outside the law to bring pressure to bear illegally on myself, persons near me and even including the Presidency of Colombia.

As I have always told you, I bought the monstrance in Colombia in 1981. I did so with the assurance that the sale was legal. I even obtained from the convent a document, signed by the Abbess, reflecting that the sale had been approved by the Colombian government as well as the Catholic church. This is the document which I delivered to you with the monstrance.

You should also know that it is true, as declared in the Colombian press by Monsignor Trujillo Arango, that the monstrance was sold to me because there was no money in the convent, but there was no one in Colombia, even the government, who would offer the price that I paid.

When I brought the monstrance into the U.S.A. immediately after my purchase, I turned over the entire matter of customs to the broker. I am sure that he did nothing intentionally wrong even if someone in his office later made the clerical error of

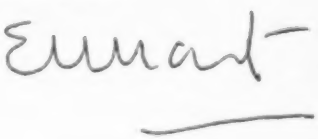
saying "Bogota, Spain"; an error which I thought was completely cleared up back in 1981.

Even though I did nothing wrong, I have my responsibility to you as my customer to make sure that the burden on you is minimized. You, who received the monstrance in good faith and made your option payment in full compliance with our contracts, should not suffer.

To alleviate somewhat the inconvenience which this trouble has caused to you, I hereby formally extend the initial option period established in our Contract Agreement dated October 29, 1982, by the exact number of days during which the monstance is witheld from you following its seizure. In other words, instead of your obligation being to make the second confidence deposit on December 16, 1983, (one year from the date of the initial deposit) the due date for that confidence deposit payment is postponed by the number of days from the date of the seizure on January 20, 1983, to the date on which the monstrance is returned to you by the U.S. government. This extension is made without effect on your rights established by our agreements.

Sincerely,

Eduardo Uhart



Supreme Court, U.S.
FILED
MAR 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 86-1232

In the Supreme Court of the United States

OCTOBER TERM, 1986

JAMES W. NEWTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

12PP

TABLE OF AUTHORITIES

Page

Cases:

United States v. *Five Hundred Thousand Dollars*, 730 F.2d 1437 (11th Cir. 1984) 5, 8

United States v. *Four Million, Two Hundred Fifty-five Thousand*, 762 F.2d 895 (11th Cir. 1985), cert. denied, No. 85-675 (Jan. 13, 1986) 5

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Page

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18 U.S.C. 545 ..... 1, 4, 6
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Miscellaneous:

124 Cong. Rec. 34672 (1978) 6

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1232

JAMES W. NEWTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges the court of appeals' holding that, because he had no legal or equitable ownership interest in an illegally imported item, he had no standing to challenge its forfeiture under 18 U.S.C. 545.

1. On December 6, 1983, the United States filed a complaint in the United States District Court for the Western District of Texas seeking civil forfeiture of a religious item known as a monstrance. The complaint alleged that the monstrance was subject to forfeiture under 18 U.S.C. 545 because it had been illegally imported into this country. Petitioner and the Republic of Colombia filed claims to the monstrance. After an evidentiary hearing, the district court determined that petitioner did not have a sufficient interest in the property to afford him standing as a claimant. The district court ordered the monstrance to be forfeited to the

United States (Pet. App. 20a-44a).[1] The court of appeals affirmed (Pet. App. la-19a).

a. The monstrance—a religious artifact of gold and precious jewels worth at least $3 million (see Republic of Colombia Br. in Opp. App. 31r (photograph))—was made in the 18th century for the Convent of the Sisters of Santa Clara in Tunja, Colombia, where it remained for 200 years (Pet. App. 4a-5a). In 1978, to obtain funds to repair their convent, the nuns sold the monstrance to a Colombian on condition that the monstrance remain in Colombia (*id.* at 5a, 24a). Despite that proviso, Eduardo Uhart bought the monstrance in 1981 and brought it into this country in February 1981 (*id.* at 6a, 40a). Uhart did not obtain the required export documents from Colombia, and the Customs declarations that he filed on importation of the monstrance into the United States contained false statements concerning, inter alia, the value of the monstrance, its country of origin, its prior ownership, and the existence of a valid bill of sale. (*id.* at 6a-7a, 27a-30a).

About a month later, Uhart telephoned petitioner in San Antonio, Texas, described the monstrance, and offered to transport it to San Antonio so that petitioner could seek a buyer for it (Pet. App. 7a, 40a). Uhart brought the monstrance to San Antonio, but petitioner was not able to locate a buyer. Uhart returned to San Antonio in the summer of 1982, and in October Uhart and petitioner agreed that petitioner would act as a broker and have one year to sell the monstrance for at least $1 million. If he were successful in arranging such a sale, petitioner would receive 20 percent of the selling price. In order to secure that arrangement, petitioner agreed to pay Uhart $200,000 as a "confidence deposit" on the monstrance. If petitioner failed

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[1]Under an agreement with the United States, the Republic of Colombia did not contest the forfeiture, and the monstrance will be returned to Colombia if the forfeiture judgment of the district court is executed.

to locate a buyer after one year, petitioner would return the monstrance upon Uhart's refund of the "confidence deposit" (*id.* at 7a-8a, 40a). In December 1982 petitioner and Uhart signed an extension of the agreement, giving petitioner the "exclusive right to sell or place" the monstrance (*id.* at 8a).

In November 1982, petitioner showed the monstrance to Dr. Nancy Kelker, a curator at the San Antonio Museum of Art. After assuring her that Colombian Customs officials had approved the export of the monstrance, petitioner requested that Dr. Kelker not make any inquiries about the artifact in Colombia. Petitioner also said that the museum should not nationally advertise the monstrance. These statements aroused Dr. Kelker's suspicions and prompted her to undertake an investigation. She determined from the Customs broker who handled Uhart's importation of the monstrance that Uhart had no Colombian export documents. She also learned from a Colombian museum that the monstrance had been removed clandestinely from Colombia (Pet. App. 9a, 28a-29a). Dr. Kelker reported her findings to the United States Customs Service.

Customs agents posing as prospective buyers met with petitioner in January 1983 (Pet. App. 9a, 26a). Petitioner told the agents, as he had told Dr. Kelker, that they should not contact anyone in Colombia about the monstrance. He admitted that there were no export documents from Colombia, but he claimed that everything had been "taken care of" (*id.* at 26a-27a). He also showed the agents a packet purporting to be, but in fact different from, the Customs documents filed by Uhart (*id.* at 27a). The agents then identified themselves and seized the monstrance as evidence of Customs violations (*id.* at 9a). Uhart was indicted for making false statements in his Customs declarations at the time he imported the monstrance, but he absconded and remains a fugitive.

b. The United States instituted forfeiture proceedings against the monstrance under 18 U.S.C. 545. Petitioner filed a claim to the monstrance under 19 U.S.C. 1603-1618, the statutory provisions that apply to forfeiture proceedings against illegally imported goods. After an evidentiary hearing, the district court dismissed petitioner's claim to the monstrance on the ground that petitioner lacked standing to contest the forfeiture (Pet. App. 39a-44a). Rejecting petitioner's contention that his $200,000 "confidence deposit" was actually a down payment on his purchase of the monstrance, the court held that, although petitioner had possession and control of the monstrance at the time of the seizure, the evidence established that he had no ownership interest in the monstrance but rather was simply a broker trying to sell it for Uhart (*id.* at 41a-44a). The court subsequently found that the monstrance was properly forfeited to the United States (*id.* at 23a-38a).[2]

The court of appeals affirmed (Pet. App. 1a-19a). The court agreed with the district court's factual finding that petitioner did not have any legal ownership interest in the monstrance (*id.* at 14a-15a) and that all he had was a contingent future interest in proceeds from any sale he could arrange (*id.* at 15a, 18a). For the same reasons, the court also held that petitioner had no equitable title to the monstrance (*id.* at 17a-18a). In denying petitioner's rehearing petition, the court concluded that petitioner had been "unable to establish a facially colorable ownership interest of either a legal or equitable nature" (*id.* at 48a) and thus reaffirmed its holding that petitioner lacked standing to contest the forfeiture.

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[2]Petitioner's request to the government for remission of the monstrance, under 19 U.S.C. 1618, was subsequently denied on the ground that petitioner had "failed to establish that he has a good faith interest in the subject property" (Pet. App. 65a).

2. Petitioner contends (Pet. 5-16) that the court of appeals erred in denying him the right to contest the forfeiture. The court of appeals' fact-bound decision is correct, and it does not present a conflict with any decision of this Court or of another court of appeals. Accordingly, the case does not merit further review by this Court.

a. Petitioner first argues (Pet. 5-12) that the court of appeals erroneously denied him standing to contest the forfeiture. Under the statutes governing the forfeiture proceeding, 19 U.S.C. 1603-1618, only a person who is "claiming" the property (19 U.S.C. 1608) may participate in the proceeding, which is, after all, a contest over who should receive the property.[3] The courts of appeals have uniformly held that a "claimant" in a forfeiture proceeding must have more than a mere financial interest, such as the interest possessed by a creditor of the owner, that the property might be used to satisfy. See, *e.g.*, *United States* v. *$3,799.00 in United States Currency*, 684 F.2d 674, 678 (10th Cir. 1982); *United States* v. *Five Hundred Thousand Dollars*, 730 F.2d 1437, 1439-1440 (11th Cir. 1984). Rather, the claimant must have a property interest in the object against which the proceeding is brought. See, *e.g.*, *United States* v. *Four Million, Two Hundred Fifty-five Thousand*, 762 F.2d 895, 907 (11th Cir. 1985), cert. denied, No. 85-675 (Jan. 13, 1986); *United States* v. *1982 Sanger 24' Spectra Boat*, 738 F.2d 1043, 1046-1047 (9th Cir. 1984) (requiring some "specific property interest * * * in the properties"); *United States* v. *One 1945 Douglas C-54 (DC-4) Aircraft*, 647 F.2d 864, 866 (8th Cir. 1981), cert. denied, 454 U.S. 1143 (1982). At a minimum, a claimant must have "a

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[3]Petitioner's reliance on constitutional standing cases (Pet. 6-8) is misplaced. The standing question decided by the lower courts was whether petitioner was a "claimant" within the meaning of 19 U.S.C. 1603-1618.

recognizable legal or equitable interest in the property seized" (124 Cong. Rec. 34672 (1978)).[4]

Petitioner had no such interest in the monstrance, although he might well have a claim against Uhart for return of his $200,000 "confidence deposit." Both the district court and the court of appeals in this case found that the evidence affirmatively established that petitioner did not have any legal or equitable ownership interest in the monstrance. Pet. App. 15a-18a, 41a-44a, 48a. Petitioner does not challenge those holdings. In these circumstances, the courts below were correct in holding that petitioner could not legitimately be "claiming" the monstrance (19 U.S.C. 1608) and hence could not contest the forfeiture.

Contrary to petitioner's suggestion (Pet. 10-12), the ruling of the court of appeals does not create a conflict among the circuits. No court has suggested that there is a conflict in the test used to establish standing to contest forfeiture. The variety of cases dealing with the issue simply illustrates that the property interest that is required for standing "may be evidenced in a number of ways including showings of actual possession, control, title and financial stake" (*United States* v. *One 1945 Douglas C-54 (DC-4) Aircraft*, 647 F.2d at 866). The required showing has thus varied with the circumstances. None of the cases cited by petitioner finds standing in circumstances similar to those presented here.

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[4]In 1978, Congress amended 21 U.S.C. 881(a), which concerns drug-related forfeitures. The amendment was designed in part to protect certain "innocent owner[s]" against forfeitures, and the amended statute used the term "owner" to mean "any person with a recognizable legal or equitable interest in the property seized" (124 Cong. Rec. 34672 (1978) (Joint House-Senate Explanatory Statement)). Forfeiture proceedings under 21 U.S.C. 881(a) are generally subject to the provisions of 19 U.S.C. 1603-1618. Although the standing restrictions for forfeitures under 21 U.S.C. 881(a) might conceivably be more relaxed than in Customs forfeiture cases, like this one, which are brought under 18 U.S.C. 545 (see Pet. App. 16a-17a), we assume, arguendo, that the standing inquiry is the same in the two contexts. Virtually all of the cases relied on by petitioner involve forfeitures under 21 U.S.C. 881(a).

Only two of the cases cited by petitioner involved a standing issue and found that the claimant had standing. Thus, in *United States* v. *1982 Sanger 24' Spectra Boat, supra*, the Ninth Circuit, in a case under 21 U.S.C. 881(a), held simply that actual ownership is not required for standing, but that some unspecified "lesser property interest" might suffice (738 F.2d at 1046-1047). In *United States* v. *One Hundred Twenty-Two Thousand Forty-Three Dollars ($122,043.00) in United States Currency*, 792 F.2d 1470 (1986), a forfeiture case under both the drug statute (21 U.S.C. 881(a)) and a currency reporting statute (31 U.S.C. 5317), the Ninth Circuit held that a woman's possession of cash that she said belonged to her husband gave her a sufficient interest to contest the forfeiture. Without conceding the correctness of that ruling,[5] we note two important distinctions between that case and this one: First, there was no proof there that the claimant did not in fact have an ownership interest in the currency. In this case, by contrast, the evidence proved that Uhart was the owner and that petitioner had no ownership interest in the monstrance. Second, a rule recognizing standing based on possession alone might well be justified for currency even if it is not justified for other kinds of property, because "negotiable instruments [are] difficult to identify and trace" (*United States* v. *Wright*, 610 F.2d 930, 939 (D.C. Cir. 1979)) and possession of cash may be tantamount to ownership where there is no adverse claimant (*United States* v. *Palmer*, 565 F.2d 1063, 1065 (9th Cir. 1977)).

Three of the cases cited by petitioner involved denials of standing to the claimants. *United States* v. *One 1945 Douglas C-54 (DC-4) Aircraft, supra*, held that the claimant did

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[5]The government had no interest in seeking certiorari in the case because the court of appeals held the currency properly forfeited after recognizing the claimant's standing to contest the forfeiture. 792 F.2d at 1473-1478.

not have standing to contest forfeiture of an airplane actually owned by someone else, despite various formal indicia of the claimant's ownership. *United States* v. *Five Hundred Thousand Dollars*, 730 F.2d at 1439-1440, denied standing to a claimant who could show only that he had a contingent interest in seized cash. *United States* v. *$3,799.00 in United States Currency, supra*, denied standing to a currency claimant whose "only proprietary interest in the money was that it represented a gambling debt owed to him [by the owner of the currency]" (684 F.2d at 678). The other two cases petitioner cites involved no standing issue at all. *United States* v. *United States Currency in the Amount of $2,857.00*, 754 F.2d 208 (7th Cir. 1985), raised no issue concerning the substantive, as opposed to procedural, requirements for a claimant to contest a forfeiture. And this Court in *United States* v. *One Ford Coupe Automobile*, 272 U.S. 321 (1926), reached the merits of the forfeiture action without a separate discussion of standing for the simple reason that the claimant, without contradiction, asserted that he had title to the car against which the forfeiture proceeding was brought (*id.* at 323).

3. Petitioner also argues (Pet. 13-16) that the court of appeals' approval of the forfeiture of the monstrance without petitioner's participation as a claimant deprived petitioner of property without due process.[6] This argument is merely a restatement of petitioner's claim—rejected by both courts below—that he was a bona fide purchaser of the monstrance. The district court, after a full and fair hearing,

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[6]Petitioner also challenges (Pet. 14-16) the district court's reliance on the relation-back doctrine of *United States* v. *Stowell*, 133 U.S. 1 (1890). But the district court did not rely on that doctrine in dismissing petitioner from the case (Pet. App. 44a), the court of appeals did not address the correctness of the doctrine, and the issue is irrelevant in light of the district court's dismissal of petitioner's claim on standing grounds.

found that petitioner had no property interest in the monstrance, and the court of appeals affirmed that finding. Having been found to have no legal or equitable interest in the monstrance, petitioner cannot claim that he has been deprived of property without due process of law.[7]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

MARCH 1987

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[7]Petitioner includes the rejection of his remission petition as a basis for his due process argument. But petitioner has never before challenged the remission decision and cannot raise such a challenge here for the first time. In any event, as the factual findings of the district court make clear, there was ample evidence to support the Attorney General's conclusion that petitioner had not shown that he had a good faith property interest in the monstrance.